FILED
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CLERK

No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN, *Petitioner*,

v.

DONALD RUMSFELD, *et al.*, *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

JOINT APPENDIX
VOLUME I - JA 1 - 174

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Petition for Certiorari Filed: August 8, 2005
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United States District Court
U.S. District Court -- Western Washington (Seattle)

CIVIL DOCKET FOR CASE #: 2:04-cv-00777-RSL

Swift v. Rumsfeld et al.

SELECTED DISTRICT COURT DOCKET ENTRIES

04/06/2004	1	PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. 1361 OR, IN THE ALTERNATIVE, WRIT OF HABEAS CORPUS (Receipt # 408682) , filed by Charles Swift. (Attachments: # 1 Civil Cover Sheet) (JEM,) (Entered: 04/07/2004)
04/06/2004	2	DECLARATION of Lieutenant Commander Charles Swift re 1 Petition for Writ of Mandamus Pursuant to 28 U.S.C. 1361 or, in the Alternative, Writ of Habeas Corpus (Exhibit J pages 65-66 FILED UNDER SEAL) by Petitioner Charles Swift. (JEM,) (Entered: 04/07/2004)
04/06/2004	3	EXHIBIT J/DECLARATION by Petitioner Charles Swift re 2 Declaration of Lieutenant Commander Charles Swift (Exhibit J pages 65-66). (JEM,) Modified on 6/9/2004 to unseal(RS,). (Entered: 04/07/2004)
04/06/2004	4	DECLARATION of Charles P. Schmitz, Ph.D. re 1 Petition for Writ of Mandamus Pursuant to 28 U.S.C. 1361 or, in the Alternative, Writ of Habeas Corpus (Exhibit A pages 5-7 and Exhibit B pages

		9-12 FILED UNDER SEAL) by Petitioner Charles Swift. (JEM,) (Entered: 04/07/2004)
04/06/2004	5	Declaration of Charles P. Schmitz, Ph.D. (Exhibit A pages 5-7 and Exhibit B pages 9-12). Modified on 8/5/2004 to unseal document per 8/5/04 Order(RS,). (Entered: 04/07/2004)
04/06/2004	6	DECLARATION of Daryl Matthews, M.D., Ph.D. re 1 Petition for Writ of Mandamus Pursuant to 28 U.S.C. 1361 or, in the Alternative, Writ of Habeas Corpus by Petitioner Charles Swift. (JEM,) (Entered: 04/07/2004)
04/15/2004	11	MEMORANDUM re 1 Petition for Writ of Habeas Corpus by Petitioner Charles Swift. (Attachments: # 1 # 2 # 3 # 4) (Schneider, Harry) (Entered: 04/15/2004)
04/15/2004	12	APPENDIX re 11 Memorandum *Appendix (pp. 1-6) is part of Attachment 1* by Petitioner Charles Swift. (Attachments: # 1 # 2 # 3 # 4 # 5 # 6 # 7 # 8 # 9 # 10 # 11 # 12 # 13 # 14 # 15 # 16 # 17 # 18 # 19 # 20 # 21) (Schneider, Harry) (Entered: 04/15/2004)
04/23/2004	13	MOTION for Order *Holding Petition in Abeyance; Memorandum of Points and Authorities in Support Thereof* by Respondents John D Altenburg Jr., George W Bush, Thomas L Hemingway, Jay Hood, Donald H Rumsfeld. Noting Date 5/14/2004. (Attachments: # 1 Exhibit A# 2

		Exhibit B & C) (Kipnis, Brian) (Entered: 04/23/2004)
04/27/2004	14	REQUEST by Petitioner Charles Swift for Early Status Conference. (Attachments: # 1) (Schneider, Harry) (Entered: 04/27/2004)
04/29/2004	15	MINUTE ORDER Status Conference set for 5/6/2004 at 01:30 PM before Hon. Robert S. Lasnik. (KERR,) (Entered: 04/29/2004)
05/03/2004	16	RESPONSE by Petitioner Charles Swift re 13 MOTION for Order *Holding Petition in Abeyance; Memorandum of Points and Authorities in Support Thereof Petitioner's Opposition to Motion for Order Holding Petition in Abeyance.* (Attachments: # 1) (Schneider, Harry) (Entered: 05/03/2004)
05/03/2004	17	DECLARATION re 16 Response, *Declaration of Harry H. Schneider, Jr.* by Petitioner Charles Swift. (Attachments: # 1) (Schneider, Harry) (Entered: 05/03/2004)
05/03/2004	18	Exhibit A/DECLARATION by Petitioner Charles Swift re 17 Declaration *of Harry H. Schneider, Jr., Exhibit A.* (Schneider, Harry) Modified on 6/9/2004 to unseal (RS,). (Entered: 05/03/2004)
05/03/2004	19	*Declaration of Lieutenant Commander Charles Swift.* (Attachments: # 1 unsealed) (Schneider, Harry) Modified on 8/5/2004 to unseal document per 8/5/04 Order(RS,). (Entered: 05/03/2004)

05/05/2004	20	REPLY, filed by Respondent Donald H Rumsfeld, to Response to 13 MOTION for Order *Holding Petition in Abeyance; Memorandum of Points and Authorities in Support Thereof* (Kipnis, Brian) (Entered: 05/05/2004)
05/06/2004	21	MINUTE ENTRY for proceedings held before Judge Robert S. Lasnik - Dep Clerk: *Kerry Lane*; CR: *Donna Hunter (Vernon)*; Pla Counsel: *Harry Schneider, Neal Katyal, Lieutenant Commander Charles Swift and Joseph McMillan*; Def Counsel: *Gregory Garre and Brian Kipnis*; Status Conference held on 5/6/2004. The Court and counsel discuss the posture of the case. After hearing from counsel, the Court schedules oral argument on respondents' motion for order to hold petition in abeyance for Friday, May 7, 2004 at 08:30 AM. (KERR,) (Entered: 05/07/2004)
05/07/2004	22	MINUTE ENTRY for proceedings held before Judge Robert S. Lasnik - Dep Clerk: *Kerry Lane*; CR: *Donna Hunter (Vernon)*; Pla Counsel: *Neal Katyal, Lieutenant Commander Charles Swift, Harry Schneider and Joseph McMillan*; Def Counsel: *Gregory Garre and Brian Kipnis*; Motion Hearing held on 5/7/2004 re 13 MOTION for Order *Holding Petition in Abeyance* filed by respondents. After hearing the arguments of counsel, the Court takes this matter under advisement. (KERR,) (Entered: 05/07/2004)

05/11/2004	23	ORDER GRANTING MOTION TO HOLD PETITION IN ABEYANCE; oral argument set for 9/8/2004 09:00 AM before Hon Robert S. Lasnik.(RS,) (Entered: 05/11/2004)
06/08/2004	26	Letter from Brian C. Kipnis. (Kipnis, Brian) (Entered: 06/08/2004)
06/09/2004	27	ORDER UNSEALING DOCUMENTS by Judge Robert S. Lasnik. (RS,) (Entered: 06/09/2004)
06/22/2004	28	Letter from Brian C. Kipnis. (Kipnis, Brian) (Entered: 06/22/2004)
07/07/2004	30	MOTION for Order Authorizing Limited Discovery by Petitioner Charles Swift. Noting Date 7/23/2004. (Attachments: # 1 Proposed Order # 2 Exhibit) (Schneider, Harry) Modified on 7/8/2004 to edit docket text (ECS,) (Entered: 07/07/2004)
07/13/2004	31	MINUTE ORDER Status Conference set for 7/16/2004 at 11:00 AM before Hon Robert S. Lasnik. (KERR,) (Entered: 07/13/2004)
07/16/2004	33	MINUTE ENTRY for proceedings held before Judge Robert S. Lasnik - Dep Clerk: *Kerry Lane*; CR: *Susan Zielie*; Pla Counsel: *Harry Schneider, Joe McMillan, David East and Neal Katyal (via telephone)*; Def Counsel: *Brian Kipnis*; Status Conference held on 7/16/2004. After hearing from counsel, the Court sets the following briefing schedule: Respondents' motion on preliminary issues is due 7/16/2004. Petitioner's

response is due 7/23/2004. Respondents' reply is due 7/27/2004. The motion should be noted for 7/27/2004. Respondents' response to the petition is due 8/4/2004. Petitioner's reply is due 8/18/2004. Oral argument on the petition remains scheduled for 9:00 a.m. on 9/8/2004. (KERR,) (Entered: 07/16/2004)

07/16/2004 34 MOTION to Dismiss *or Transfer; Memorandum of Points and Authorities in Support Thereof* by Respondents John D Altenburg Jr., George W Bush, Thomas L Hemingway, Donald H Rumsfeld. Noting Date 7/27/2004. (Attachments: # 1 Exhibit A) (Kipnis, Brian) Modified on 7/19/2004 to edit docket text (ECS,). (Entered: 07/16/2004)

07/16/2004 35 SCHEDULING ORDER: Respondents' motion on preliminary issues is due 7/16/2004. Petitioner's response is due 7/23/2004. Respondents' reply is due 7/27/2004. The motion should be noted for 7/27/2004. Respondents' return to the petition is due 8/4/2004. Petitioner's reply is due 8/18/2004. Oral argument on the petition remains scheduled for 9:00 a.m. on 9/8/2004; by Judge Robert S. Lasnik. (AF,) (Entered: 07/19/2004)

07/23/2004 36 RESPONSE, by Petitioner Charles Swift, to 34 MOTION to Dismiss *Notice of Motion and Motion to Transfer; Memorandum of Points and Authorities in Support Thereof* (Schneider, Harry) (Entered: 07/23/2004)

07/23/2004	37	Declaration of Lieutenant Charles Swift, JAGC, USN by Petitioner Charles Swift re 36 Response to Motion. (Schneider, Harry) Modified on 8/5/2004 to unseal per 8/5/04 Order (RS,). (Entered: 07/23/2004)
07/23/2004	38	DECLARATION of Harry H. Schneider, Jr. filed by Petitioner Charles Swift re 36 Response to Motion (Attachments: # 1 Exhibit pp. 4-6) (Schneider, Harry) (Entered: 07/23/2004)
07/23/2004	39	~~RESPONSE~~ MOTION of Arthur R. Miller as Amicus Curiae for Leave to File Opposition to Respondents' 34 MOTION to Dismiss or Transfer. Noting Date - 7/27/2004 (Unopposed). (Attachments: # 1 Exhibit - Amicus Curiae Memorandum of Arthur R. Miller in Opposition to Respondents' Motion to Dismiss or Transfer# 2 Proposed Order Granting Amicus Curiae Miller's Motion for Leave to File Opposition re Motion to DIsmiss or Transfer) (Murray, James) Modified text on 7/26/2004 (AF,). (Entered: 07/23/2004)
07/23/2004		39 Arthur R. Miller's Motion for Leave to File Opposition to Motion to Dismiss or Transfer re 39 Response to Motion, NOTED on motion calendar; Noting Date 7/27/2004. (AF,) (Entered: 07/26/2004)
07/27/2004	40	REPLY, filed by Respondents John D Altenburg Jr., George W Bush, Thomas L Hemingway, Jay Hood, Donald H Rumsfeld, TO RESPONSE to 34 MOTION to Dismiss *Notice of Motion*

		and Motion to Transfer; Memorandum of Points and Authorities in Support Thereof (Kipnis, Brian) (Entered: 07/27/2004)
07/29/2004	41	SURREPLY filed by Amicus Arthur R. Miller re 34 MOTION to Dismiss *Notice of Motion and Motion to Transfer; Memorandum of Points and Authorities in Support Thereof to Respondents' Reply in Support of Motion to Dismiss or Transfer* (Attachments: # 1 Proposed Order Granting Amicus Curiae Miller Leave to file Surreply# 2 Supplement Surreply of Arthur R. Miller as Amicus Curiae to Respondents' Reply in Support of Motion to Dismiss or Transfer) (Murray, James) (Entered: 07/29/2004)
07/30/2004	43	RESPONSE by Respondents John D Altenburg Jr., George W Bush, Thomas L Hemingway, Jay Hood, Donald H Rumsfeld re 41 Surreply, *Response to Motion by Amicus Arthur R. Miller for Order Granting Leave to File a Surreply.* (Kipnis, Brian) (Entered: 07/30/2004)
07/30/2004	44	Letter from Brian C. Kipnis to The Honorable Robert S. Lasnik *possible telephonic motion to extend time.* (Kipnis, Brian) (Entered: 07/30/2004)
08/02/2004	45	Letter from Brian C. Kipnis. (Kipnis, Brian) (Entered: 08/02/2004)
08/02/2004	48	AMENDED SCHEDULING ORDER respondents' return to petition due 8/6/04; reply due 8/20/04 by Judge Robert S. Lasnik. (RS,) (Entered: 08/03/2004)

08/05/2004	49	ORDER unsealing all portions of the following docket entries: 37 7/23/04 Decl of Lieutenant Commander Swift 19 5/3/04 Decl of Lieutenant Commander Swift 5 Affidavit of Salim Ahmed Salim Hamdan and a purported English translation of Affidavit by Judge Robert S. Lasnik. (RS,) (Entered: 08/05/2004)
08/06/2004	50	MOTION to Dismiss *and Return to Petition* by Respondents John D Altenburg Jr., George W Bush, Thomas L Hemingway, Jay Hood, Donald H Rumsfeld. Noting Date 9/3/2004.Oral Argument Requested. (Attachments: # 1 Exhibit A - Charge# 2 Exhibit B - Referral) (Kipnis, Brian) (Entered: 08/06/2004)
08/09/2004	51	ORDER TRANSFERRING CASE TO DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 34 by Judge Robert S. Lasnik. The Court GRANTS IN PART Respondents' motion and STRIKES the deadlines for Petitioner's reply and TRANSFERS this case to the United States Court for the District of Columbia. (KERR,) (Entered: 08/09/2004)
08/19/2004	52	Letter re transfer. As per Order of Transfer docket # 51 2 cd's containing docs. 1-51, certifiedcopy of docket sheet and Order # 51 were mailed (certified mail) to USD Court of Columbia, WA.D.C. (CL,) (CL,). Modified on 8/19/2004 (CL,). Modified on 8/23/2004 (CL,). (Entered: 08/19/2004)

09/14/2004	55	RECEIPT of case sent to USDC Dist of Columbia; their case number 1:04CV01519 (RS,) (Entered: 09/16/2004)

United States District Court
U.S. District Court -- District of Columbia
(Washington, DC)

CIVIL DOCKET FOR CASE #: 1:04-cv-01519-JR

Hamdan v. Rumsfeld et al.

SELECTED DISTRICT COURT DOCKET ENTRIES

09/02/2004	1	Case transferred in from Western District of Washington at Seattle Division Case Number 04-777. (Entered: 09/02/2004)
09/10/2004	9	ORDER granting upon condition motions for pro hac vice appearances of Joseph McMillan 6, LCDR Charles Swift 7, and Neal Katyal 8. Plaintiff's request for early status conference 3 is granted. A status conference will be held at 3:00 p.m. on September 14, 2004. Signed by Judge James Robertson on September 10, 2004. (MT) (Entered: 09/10/2004)
09/14/2004		Motion Hearing held. The petition for writ of mandamus pursuant to 28 USC 1361, or in the alternative, writ of habeus corpus, is hereby deemed amended so that it is filed in the principal name of Salim Ahmed Hamdan,with Lieutenant Commander Charles Swift, yourself, Mr. Sharp and the others as counsel. All further proceedings will be filed with that caption and the docket of the case will so reflect without further order. Mr. Hamdan will sign the amended petition as soon as it can possibly be presented to him, and the signature will

		be deemed nunc pro tunc. This matter will now be referred to Judge Joyce Hens Green, who will schedule any further proceedings. It will be referred with a recommendation from me that she promptly turn her attention to the protective order situation, and with some appropriate information from me about where this matter appears to stand in line with the other petitions. This matter appears to be at the head of the line. But that is for her to decide. The parties will hear further from her or from this court but the case is still assigned to me. (Court Reporter Rachel King.) (dam,) (Entered: 09/17/2004)
09/20/2004	11	ORDER setting filing schedule and directing the filing of corresondence previously submitted to the Court.. Signed by Judge Joyce Hens Green on 9-20-04. (rew,) (Entered: 09/20/2004)
09/20/2004	12	Letter dated 9-20-04 from David Salmons, Esq. and Neal Katyal, Esq. (# 1 Supplement Letter dated 8-31-04 from Thomas Lee, Esq. USDOJ# 2 Supplement Letter dated 9-1-04 from Thomas Lee, Esq. USDOJ# 3 Supplement Letter dated 9-2-04 from Thomas Wilner, Esq.# 4 Supplement Letter dated 8-25-04 from Erwin Chemerinsky, Esq.# 5 Supplement Letter dated 9-17-04 from KELLER AND HECKMAN) (lc,) (Entered: 09/20/2004)
09/20/2004	13	ORDER setting status conference, briefing schedule for protective order, and for notification of released detainees.. Signed

by Judge Joyce Hens Green on 9-20-04. (rew,) (Entered: 09/20/2004)

09/24/2004 30 BRIEF in support of Respondents' Cross-Motion To Dismiss filed as Amici Curiae by ALLIED EDUCATIONAL FOUNDATION, WASHINGTON LEGAL FOUNDATION. (lc,) (Entered: 10/08/2004)

09/28/2004 16 MOTION for Leave to File Excess Pages *for Responsive Filing Under Court's Sept. 20, 2004, Order* by JOHN D ALTENBURG, GEORGE W. BUSH, THOMAS L. HEMINGWAY, JAY HOOD, DONALD H. RUMSFELD. (Attachments: # 1 Text of Proposed Order) (Henry, Terry) (Entered: 09/28/2004)

09/29/2004 27 MOTION for Leave to File As Amici Curiae In Support of Petitioner by 271 United Kingdom And European Parlimentarians. (Attachments: # 1 Memorandum of Law# 2 Appendix # 3 Text of Proposed Order) (lc,) (Entered: 10/06/2004)

09/30/2004 20 MOTION Of International Law Professors For Leave to File a Memorandum As Amici Curiae. (Attachments: # 1 Text of Proposed Order # 2 Memorandum# 3 Table of Authorities# 4 List of Amici) (lc,) (Entered: 09/30/2004)

09/30/2004 22 MOTION for Leave to Appear Amicus Curiae by BRUCE ACKERMAN, ROSA EHRENREICH BROOKS, SARAH H. CLEVELAND, WILLIAM S. DODGE,

		MARTIN S. FLAHERTY, RYAN GOODMAN, OONA HATHAWAY, DEREK JINKS, KEVIN R. JOHNSON, JENNIFER S. MARTINEZ, JUDITH RESNIK, DAVID SCHEFFER, ANNE-MARIE SLAUGHTER, DAVID SLOSS, CARLOS M. VAZQUEZ, DAVID C. VLADECK. (Attachments: # 1 Text of Proposed Order # 2 Proposed Amicus Brief) (nmw,) (Entered: 09/30/2004)
09/30/2004	23	Memorandum in opposition to motion re 19 *Petitioner's Consolidated Reply to Respondents' Return and Opposition to Cross Motion to Dismiss* filed by CHARLES SWIFT. (Attachments: # 1 Text of Proposed Order [Proposed] Order Denying Motion to Dismiss) (McMillan, Joseph) (Entered: 09/30/2004)
09/30/2004	25	MOTION for Leave to Appear Amicus Curiae by RICHARD O'MEARA, JOHN D. HUTSON, LEE F. GUNN, DAVID M. BRAHMS. (Attachments: # 1 Amicus Brief# 2 Motion to Appear Pro Hac Vice-Wu# 3 Motion to Appear Pro Hac Vice-Steeley) (nmw,) (Entered: 10/01/2004)
09/30/2004	44	AMICUS BRIEF by CENTER FOR INTERNATIONAL HUMAN RIGHTS, LOUISE DOSWALD-BECK, GUY S. GOODWIN-GILL, FRITS KALSHOVEN, MARCO SASSOLI. (lc,) (Entered: 10/22/2004)
10/01/2004	24	Unopposed MOTION for Clarification Regarding Submission of Response and Factual Return re 11 Order, 15 Order on

		Motion for Leave to Appear by JOHN D ALTENBURG, GEORGE W. BUSH, THOMAS L. HEMINGWAY, JAY HOOD, DONALD H. RUMSFELD. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Text of Proposed Order) (Henry, Terry) (Entered: 10/01/2004)
10/01/2004	28	MOTION and Brief for Leave to File As Amici Curiae by CENTER FOR INTERNATIONAL HUMAN RIGHTS, MARCO SASSOLI, FRITS KALSHOVEN, GUY S. GOODWIN-GILL, LOUISE DOSWALD-BECK. (Attachments: # 1 Text of Proposed Order) (lc,) (Entered: 10/06/2004)
10/04/2004		Set/Reset Hearings: Status Conference set for 10/13/2004 10:00 AM in Courtroom 2 before Joyce Hens Green. (Burgess, Joe) (Entered: 10/04/2004)
10/04/2004	26	ORDER granting 24 Respondents' Unopposed Motion for Clarification Regarding Submission of a Response and Factual Return . Signed by Judge Joyce Hens Green on 10-04-04. (MD) (Entered: 10/04/2004)
10/06/2004		MINUTE ORDER (Paperless) GRANTING 22 Unopposed Motion of Sixteen Law Professors for Leave to File a Brief Amici Curiae in Support of Petitioner and in Opposition to Respondents' Cross-Motion to Dismiss, GRANTING 25 Unopposed Motion of General David M. Brahms, Admiral Lee F. Gunn, Admiral John D. Hutson, and

		General Richard O'Meara for Leave to File a Brief as Amici Curiae in Support of Petitioner, GRANTING 20 Motion of Amici Curiae International Law Professors for Leave to File Memorandum as Amici Curiae in Opposition to Respondents' Cross Motion to Dismiss . Signed by Judge Joyce Hens Green on 10/06/04. (MD) (Entered: 10/06/2004)
10/06/2004	31	MEMORANDUM from International Law Professors as Amici Curiae In Support of Petitioner. (Attachments: # 1 Table of Authorities# 2 List of Amici) (lc,) (Entered: 10/08/2004)
10/06/2004	32	AMICUS BRIEF In Support of Petitioner and in Opposition to Respondants' Cross-Motion To Dismiss filed by (16 Law Professors) BRUCE ACKERMAN, ROSA EHRENREICH BROOKS, SARAH H. CLEVELAND, WILLIAM S. DODGE, MARTIN S. FLAHERTY, RYAN GOODMAN, OONA HATHAWAY, DEREK JINKS, KEVIN R. JOHNSON, JENNIFER S. MARTINEZ, JUDITH RESNIK, DAVID SCHEFFER, ANNE-MARIE SLAUGHTER, DAVID SLOSS, CARLOS M. VAZQUEZ, DAVID C. VLADECK. (lc,) (Entered: 10/08/2004)
10/06/2004	33	AMICUS BRIEF In Support of Petitioner filed by DAVID M. BRAHMS, LEE F. GUNN, JOHN D. HUTSON, RICHARD O'MEARA. (lc,) (Entered: 10/08/2004)
10/07/2004	29	Joint MOTION for Extension of Time to File *Submissions Regarding the Proposed*

		Protective Order by JOHN D ALTENBURG, GEORGE W. BUSH, THOMAS L. HEMINGWAY, JAY HOOD, DONALD H. RUMSFELD. (Attachments: # 1 Text of Proposed Order) (Noronha, Preeya) (Entered: 10/07/2004)
10/12/2004	34	Joint MOTION to Postpone Status Conference by JOHN D ALTENBURG, GEORGE W. BUSH, THOMAS L. HEMINGWAY, JAY HOOD, DONALD H. RUMSFELD. (Attachments: # 1 Text of Proposed Order) (Henry, Terry) (Entered: 10/12/2004)
10/12/2004	36	ORDER GRANTING Extension of Time for Replies to Motions. Petitioners Shall Have Until November 5, 2004 to File Their Replies. Signed by Judge Joyce Hens Green on 10-12-04. (MD) (Entered: 10/12/2004)
10/14/2004	38	MEMORANDUM *in Reply to Opposition to Cross-Motion to Dismiss* from Respondents. (Henry, Terry) (Entered: 10/14/2004)
10/19/2004	41	Unopposed MOTION for Order *that case not be Governed by Protective Order Entered in Consolidated Proceedings* by CHARLES SWIFT. (Attachments: # 1 Text of Proposed Order Proposed Order) (Cameron, Kelly) (Entered: 10/19/2004)
10/20/2004	42	ORDER GRANTING 41 Petitioner's Unopposed Motion Regarding the Protective Order . Signed by Judge Joyce

		Hens Green on 10-20-04. (MD) (Entered: 10/20/2004)
10/29/2004	48	ORDER Setting Final Deadline for Submission of Factual Returns. Signed by Judge Joyce Hens Green on 10-29-04. (MD) (Entered: 10/29/2004)
10/29/2004	49	ORDER Requiring Submission of Classified Factual Returns. Signed by Judge Joyce Hens Green on 10-29-04. (MD) (Entered: 10/29/2004)
11/01/2004	50	ORDER Setting Deadline for Submissions in Response to Motion for an Order Requiring Parties to Abide by Proposed Procedures for Counsel Access. Signed by Judge Joyce Hens Green on 11-01-04. (MD) (Entered: 11/01/2004)
11/03/2004	52	RESPONSE to 50 *Petitioner Hamdan's Response to Proposed Procedures for Counsel Access* filed by SALIM AHMED HAMDAN. (McMillan, Joseph) (Entered: 11/03/2004)
11/04/2004	53	RESPONSE to 50 *November 1, 2004 Order Regarding Submissions on Proposed Counsel Access Procedures* filed by JOHN D ALTENBURG, GEORGE W. BUSH, THOMAS L. HEMINGWAY, JAY HOOD, DONALD H. RUMSFELD. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Affidavit) (Warden, Andrew) Modified on 11/5/2004 (lc,). (Entered: 11/04/2004)
11/05/2004	54	PROTECTIVE ORDER and Procedures for Counsel Access to Detainees at the

		United States Naval Base in Guantanamo Bay, Cuba . Signed by Judge Joyce Hens Green on 11-05-04. (MD)Document deleted pursuant to order of 11/8/04 by Judge Joyce Hens Green) Modified on 11/8/2004 (Burgess, Joe). (Entered: 11/05/2004)
11/08/2004	55	MEMORANDUM OPINION. Signed by Judge James Robertson on November 8, 2004. (MT) (Entered: 11/08/2004)
11/08/2004	56	ORDER that the petition of Salim Ahmed Hamdan for habeas corpus [1-1] is granted in part and that the cross-motion to dismiss of Donald H. Rumsfeld [1-84] is denied. Signed by Judge James Robertson on November 8, 2004. (MT) (Entered: 11/08/2004)
11/08/2004	58	AMENDED PROTECTIVE ORDER and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba. Signed by Judge Joyce Hens Green on 11-08-04.(Burgess, Joe) (Entered: 11/08/2004)
11/08/2004	59	MOTION to Designate as "Protected Information" Unclassified Information in Factual Returns to Petitions for Writ of Habeas Corpus That Is Not Filed on the Public Record by JOHN D ALTENBURG, GEORGE W. BUSH, THOMAS L. HEMINGWAY, JAY HOOD, DONALD H. RUMSFELD. (Attachments: # 1 Text of Proposed Order) (Noronha, Preeya) (Entered: 11/08/2004)

11/10/2004	60	ORDER Addressing Designation Procedures for "Protected Information." Signed by Judge Joyce Hens Green on 11-10-04. (MD) (Entered: 11/10/2004)
11/12/2004	61	NOTICE OF APPEAL as to 56 Order by JOHN D ALTENBURG, GEORGE W. BUSH, THOMAS L. HEMINGWAY, JAY HOOD, DONALD H. RUMSFELD. Filing fee $0. (nmw,) (Entered: 11/15/2004)
11/15/2004		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 61 Notice of Appeal (lc,) (Entered: 11/15/2004)
11/17/2004	62	USCA Case Number 04-5393 for 61 Notice of Appeal filed by DONALD H. RUMSFELD, GEORGE W. BUSH, JAY HOOD, JOHN D ALTENBURG, THOMAS L. HEMINGWAY. (lc,) (Entered: 11/22/2004)
11/02/2005	63	ORDER referring all motions pertaining to interpretation or construction of any protective order which has been entered in any of these cases to Magistrate Judge Alan Kay; referring to Magistrate Judge Kay all disputes pertaining to logistical issues, such as communications with or visits to clients and counsel. Signed by Judge Gladys Kessler, Chair of Calendar and Case Management Committee, on 11/2/05. (Entered: 11/02/2005)
12/06/2005	64	Emergency MOTION to Compel by SALIM AHMED HAMDAN.

		(Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit) (Sharp, Benjamin) Additional attachment(s) added on 12/7/2005 (lc,). (Entered: 12/06/2005)
12/06/2005	65	ENTERED IN ERROR.....Proposed MOTION for Order *Granting Petitioner's Motion To Compel And For Writ Aid Of Jurisdiction* by SALIM AHMED HAMDAN. (Sharp, Benjamin) Modified on 12/7/2005 (lc,). (Entered: 12/06/2005)

United States Court of Appeals
U.S. D.C. Circuit Court of Appeals

COURT OF APPEALS DOCKET#: 04-5393

Hamdan v. Rumsfeld et al.

SELECTED COURT OF APPEALS DOCKET ENTRIES

11/16/04	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Donald H. Rumsfeld, Appellant John D. Altenburg, Appellant Thomas L. Hemingway, Appellant Jay Hood, Appellant George W. Bush. [859897-1] (lvs)
11/16/04	MOTION filed (5 copies) by Appellant Donald H. Rumsfeld, et al. (certificate of personal service dated 11/16/04) to expedite case [859976-1]. Response due on 11/29/04. (sha)
11/17/04	PER CURIAM ORDER filed [860399] granting motion expedite case filed by Donald H. Rumsfeld, et al. [859976-1]. The following briefing schedule applies [860399-1]: Appellants' brief and appendix due on 12/8/04; Appellee's brief due on 12/29/04; Appellants' reply brief due on 1/10/05. Any amici curiae must file their briefs on the same date as the party they support. Before Judges Edwards, Randolph, Tatel. [Entry Date: 11/17/04] (sha)
11/29/04	NOTICE from the Supreme Court that a petition for writ of certiorari was filed on 11/22/04 and assigned No. 04-702. (lej)

12/1/04	CLERK'S ORDER filed [862704] to schedule oral argument [862704-1] before Judge Initials: ARR JGR SFW on 3/8/05 at 9:30 AM; The parties are directed to hand-file and hand-serve the briefs to be filed pursuant to this Court's 11/17/04 order. [Entry Date: 12/1/04] (cwc)
12/8/04	BRIEF filed by Appellants Donald H. Rumsfeld, John D. Altenburg, Thomas L. Hemingway, Jay Hood, George W. Bush [865981-1]. Copies: 15. Certificate of service date 12/8/04, by hand-delivery. (lvs)
12/8/04	BRIEF filed by Amicus Curiae for Appellant Amer Ctr Law Jus [865985-1]. Copies: 15. Certificate of service date 12/7/04. [FOOTNOTE ON PAGE 1 "THIS BRIEF IS FILED WITH THE CONSENT OF THE PARTIES, AND LETTERS INDICATING SUCH CONSENT ARE AVAILABLE FROM COUNSEL FOR AMICUS"]. (lvs)
12/8/04	JOINT APPENDIX filed by Appellee Salim Ahmed Hamdan, Appellants Donald H. Rumsfeld, John D. Altenburg, Thomas L. Hemingway, Jay Hood, George Bush [865987-1]. Copies: 10. (lvs)
12/8/04	BRIEF [WITH ALL PARTIES CONSENT] filed by Amicus Curiae for Appellant WA Leg Fdn, Allied Educ Fdn [867775-1]. Copies 15 Certificate of service date 12/8/04, by mail. (lvs)
12/22/04	BRIEF [WITH ALL PARTIES CONSENT PREVIOUSLY IN DISTRICT COURT] filed by Amicus Curiae for Appellee Intl Law Natl

	Security [867792-1]. Copies: 15. Certificate of service date 12/22/04, by mail. (lvs)
12/23/04	BRIEF lodged by Amicus Curiae for Appellee 305 United Kingdom and European Parliamentarians [867808-1]. Copies: 7 Certificate of service date 12/23/04, by mail/hand-delivery. [NO GREEN COVERS; 15 BRIEFS; NO SUMMARY OF ARGUMENT AND NEED NOTICE OF CONSENT]. NEED CORRECTED BRIEFS w/GREEN COVERS. (lvs)
12/23/04	CONSENT LETTER filed by Amicus Curiae for Appellant Amer Ctr Law Jus to filing their brief. (lvs)
12/27/04	BRIEF [WITH CONSENT TO FILE NOTICE IN BRIEF] filed by Amicus Curiae [PROFESSORS] for Appellee Allison Marston Danner, Jenny S. Martinez [867826-1]. Copies: 15. Certificate of service date 12/27/04, by mail. (lvs)
12/29/04	CORRECTED BRIEF filed by Amicus Curiae for Appellee 305 United Kingdom [867947-1]. Copies: 15. Certificate of service date 12/29/04, by mail. (lvs)
12/29/04	BRIEF filed by Appellee Salim Ahmed Hamdan [869377-1]. Copies: 15. Certificate of service date 12/29/04, by hand-delivery. (lvs)
12/29/04	BRIEF lodged by Movant-Amicus Curiae-Appellee Eleven Leg Scholars [869393-1]. Copies: 15. Certificate of service date 12/29/04, by mail. (lvs)

12/29/04	MOTION filed (5 copies) by Movant-Amicus Curiae-Appellee Eleven Leg Scholars (certificate of service dated 12/29/04, by mail) for leave to file [869394-1] LODGED brief [869393-1]. (lvs)
12/29/04	BRIEF filed by Movant-Amicus Curiae-Appellee Human Rights First, Physn Human Rights [869408-1]. Copies: 15. Certificate of service date 12/29/04, by hand-delivery. *Footnote 1, states that all parties give their consent to filing of this brief*. (lvs)
12/29/04	BRIEF filed by Amicus Curiae for Appellee Natl Assn Cr Def Law [869434-1]. Copies: 15. Certificate of service date 12/29/04, by mail. *COUNSEL FOR APPELLEE/APPELLANTS HAVE KINDLY CONSENTED TO NACDL'S APPEARANCE AS AMICUS CURIAE* (lvs)
12/29/04	BRIEF filed by Amicus Curiae for Appellee Military Law Pract, Kevin J. Barry, David W. Glazier, Elizabeth L. Hillman, Jonathan Lurie, Diane H. Mazur, David P. Sheldon, Gary D. Solis, Christopher F. Wilson, Donald N. Zillman [869436-1]. Copies: 15. Certificate of service date 12/29/04, by hand-delivery. (lvs)
12/29/04	BRIEF filed by Amicus Curiae for Appellee David M. Brahms, James P. Cullen, John L. Fugh, Lee F. Gunn, John D. Hutson, Merrill A. McPeak, Richard O'Meara [869466-1]. Copies: 15. Certificate of service date 12/29/04, by hand-delivery. (lvs)

12/29/04	BRIEF filed by Amicus Curiae for Appellee People Amer Way Fdn, Rutherford Inst, Eugene R. Fidell [869473-1]. Copies: 15. Certificate of service date 12/29/04. (lvs)
12/29/04	STATEMENT filed by Amicus Curiae for Appellee People Amer Way Fdn, Rutherford Inst, Eugene R. Fidell of consent of the parties to participate as amici curiae [869475-1]. Certificate of Service date 12/29/04, by hand-delivery. (lvs)
12/29/04	PETITION filed Copies: 20 by Appellee Salim Ahmed Hamdan (certificate of service dated 12/29/04, by hand-delivery) for hearing in banc [869488-1]. (lvs)
12/29/04	BRIEF filed by Amicus Curiae for Appellee Wrld Orgn Rights USA [869598-1]. Copies: 15. Certificate of service date 12/29/04, by mail. [STYLED AS BRIEF AMICUS CURIAE AND ACCOMPANYING MOTION FOR LEAVE TO FILE OF THE WORLD ORGANIZATION FOR HUMAN RIGHTS USA IN SUPPORT OF THE PETITIONER-APPELLEE]. CHECKED WITH CHERI CARTER, IT WAS OKAY TO FILE AS BRIEF, THE BRIEF IS TIMELY. (lvs)
12/29/04	BRIEF filed by Amicus Curiae for Appellee Military Attys [869603-1]. Copies: 15. Certificate of service date 12/29/04, by mail. FOOTNOTE 1, INDICATES THAT THIS BRIEF IS FILED WITH CONSENT OF ALL PARTIES* (lvs)
12/29/04	BRIEF filed by Amicus Curiae for Appellee Urban Morgan Inst [869608-1]. Copies: 15.

Certificate of service date 12/29/04, by mail. [BY EMAIL, THE CONSENT OF ALL PARTIES TO FILE THIS BRIEF]. (lvs)

12/29/04 BRIEF filed by Amicus Curiae for Appellee Assn Bar City NY [869610-1]. Copies: 15. Certificate of service date 12/29/04, by hand-delivery. *ALL PARTIES CONSENTED TO FILING THIS BRIEF* (lvs)

12/29/04 CONSENT LETTER filed by Amicus Curiae for Appellee Human Rights First, Physn Human Rights to the filing of their brief. (lvs)

12/29/04 STATEMENT filed by Amicus Curiae for Appellee People Amer Way Fdn, Amicus Curiae for Appellee Rutherford Inst pursuant to FRAP 26.1 providing corporate disclosure listing [869648-1]. Certificate of Service date 12/29/04, by hand-delivery. (lvs)

12/29/04 BRIEF lodged by Movant-Amicus Curiae-Appellee Fifteen Law Prof [869651-1]. Copies: 15. Certificate of service date 12/29/04, by hand-delivery/mail. (lvs)

12/29/04 UNOPPOSED MOTION filed (5 copies) by Movant-Amicus Curiae-Appellee Fifteen Law Prof (certificate of service dated 12/29/04, by hand-delivery/mail) for leave to file [869653-1] LODGED brief [869651-1]. (lvs)

12/29/04 BRIEF lodged by Movant-Amicus Curiae-Appellee Louise Doswald-Beck, Movant-Amicus Curiae-Appellee Guy S. Goodwin-Gill, Movant-Amicus Curiae-Appellee Frits Kalshoven, Movant-Amicus Curiae-Appellee Vaughan Lowe, Movant-Amicus Curiae-Appellee Marco Sassoli, Movant-Amicus

Curiae-Appellee Ctr Intl Human Right [869675-1]. Copies: 15. Certificate of service date 12/29/04, by hand-delivery/mail. [NO SUMMARY OF ARGUMENT; NO ASTERISKS ON TABLE OF AUTHORITIES]. NEED TO FILE CORRECTED BRIEF. (lvs)

12/29/04 MOTION filed (5 copies) by Movant-Amicus Curiae-Appellee Louise Doswald-Beck, Movant-Amicus Curiae-Appellee Guy S. Goodwin-Gill, Movant-Amicus Curiae-Appellee Frits Kalshoven, Movant-Amicus Curiaé-Appellee Vaughan Lowe, Movant-Amicus Curiae-Appellee Marco Sassoli, Movant-Amicus Curiae-Appellee Ctr Intl Human Right (certificate of service dated 12/29/04) for leave to file [869678-1] LODGED brief [869675-1]. (lvs)

12/29/04 BRIEF filed by Movant-Amicus Curiae-Appellee Noah Feldman [869679-1]. Copies: 15. Certificate of service date 12/29/04, by hand-delivery/mail. *BOTH PARTIES HAVE CONSENTED TO THE FILING OF THIS BRIEF* (lvs)

12/30/04 BRIEF filed by Amicus Curiae for Appellee Louis Fisher [869558-1]. Copies: 15. Certificate of service date 12/29/04, by mail. (lvs)

12/30/04 CONSENT LETTER filed by Amicus Curiae for Appellee Louis Fisher to file their brief in support of appellee. Certificate of service date 12/29/04, by mail. (lvs)

12/30/04	MANUSCRIPT LODGED by Amicus Curiae for Appellee Louis Fisher [869571-1]. Copies: 3. Certificate of service date 12/29/04, by mail. [STYLED AS MILITARY TRIBUNALS AND PRESIDENTIAL POWER]. (lvs)
1/10/05	REPLY BRIEF filed by Appellants Donald H. Rumsfeld, John D. Altenburg, Thomas L. Hemingway, Jay Hood, George W. Bush [872160-1]. Copies: 15. Certificate of service date 1/10/05, by hand-delivery. (lvs)
1/12/05	CLERK'S ORDER filed [870443] Directing appellants to file a response to the petition for hearing en banc [869488-1] by 1/27/05. [Entry Date: 1/12/05] (lej)
1/12/05	BRIEF lodged by Movants-Amicus Curiae-Appellee Louise Doswald-Beck, Guy S. Goodwin-Gill, Frits Kalshoven, Vaughan Lowe, Marco Sassoli, Ctr Intl Human Right [872037-1]. Copies: 15. Certificate of service date 1/12/05, by mail. (lvs)
1/21/05	NOTICE filed by THE UNITED STATES SUPREME COURT, advising that the petition for a writ of ceriorari was denied [872794-1]. Certificate of service date 1/18/05. (wmw)
1/27/05	OPPOSITION filed [873174-1] (5 copies) by Appellant Donald H. Rumsfeld, Appellant John D. Altenburg, Appellant Thomas L. Hemingway, Appellant Jay Hood, Appellant George W. Bush (certificate of hand and fax service dated 1/27/05) to petition for initial hearing en banc. (lej)

1/27/05	LETTER filed by Appellant Donald H. Rumsfeld, Appellant John D. Altenburg, Appellant Thomas L. Hemingway, Appellant Jay Hood, Appellant George W. Bush pursuant to FRAP 28j advising of additional authorities [873190-1].Certificate of service date 1/26/05. (cwc)
2/7/05	CLERK'S ORDER filed [875721] granting motions of Eleven Leg Scholars [869394-1], Fifteen Law Prof [869653-1] and Louise Doswald-Beck, et al. for leave to file briefs as amici curiae; [869678-1] Directing Clerk the lodged briefs [872037-1] [869393-1] [869651-1] [Entry Date: 2/7/05] (cwc)
2/11/05	PER CURIAM ORDER, In Banc, filed [877384] denying petition hearing in banc [869488-1] filed by Salim Ahmed Hamdan. Before Judges Ginsburg, Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Roberts, Williams. [Entry Date: 2/11/05] (mcm)
2/23/05	PER CURIAM ORDER filed [879496] to allocate oral argument times: APET minutes-30 ERES minutes- 30. [879496-1], Form 72 notice of attorney arguing case - [879496-2] due 3/2/05. [Entry Date: 2/23/05] (cwc)
4/7/05	ORAL ARGUMENT HELD before Randolph, Roberts, Williams. (vew)
7/15/05	JUDGMENT that the judgment of the district court is reversed for the reasons in the accompanying opinion. Before Judges Randolph, Roberts, Williams. [Entry Date: 7/15/05] (mcm)

7/15/05	OPINION filed [906132] (20 pgs) for the Court by Judge Randolph, CONCURRING OPINION (2 pgs) filed by Judge Williams (mcm)
7/15/05	CLERK'S ORDER filed [906133] The Clerk is directed to withhold issuance of the mandate [906133-1] pending disposition of any timely petition for rehearing. [Entry Date: 7/15/05] (mcm)
7/18/05	NOTICE filed by Clerks Office, U.S. Court of Appeals [906432-1]. Non-substantive changes have been made to opinion. (reissued) (mcm)
8/11/05	MOTION filed (5 copies) by Appellee Salim Ahmed Hamdan (certificate of hand service dated 8/11/05) to stay issuance of the mandate pending disposition of a petition for writ of certiorari. (lej)
8/12/05	NOTICE filed by Clerk, Supreme Court adivisng of the filing & docketing on 8/8/05 of a petition for writ of certiorari [920790-1]. Supreme Court Docket No. 05-184. (jth)
8/23/05	RESPONSE filed [914489-1] (5 copies) by Appellants Donald H. Rumsfeld, et al. (certificate of mail service dated 8/23/05) to a motion to stay the mandate [913394-1]. (lej)
8/26/05	MOTION filed (5 copies) (certificate of mail service dated 8/26/05) for leave to intervene for the limited purpose of filing a motion to recuse [915466-1]. Motion filed by the Movant-Intervenor Rami Bin Saad Al-Oteibi. Response due by 9/12/05. (jth)

8/26/05	MOTION LODGED (5 copies) by Movant-Intervenor Rami Bin Saad Al-Oteibi (certificate of service by mail date 8/26/05) for recusal of Judge John Roberts [915472-1]. [DOCUMENT RETURNED TO MVT-INTERVENOR PURSUANT TO 10/11/05 ORDER] (jth)
8/29/05	REPLY filed [917039-1] (5 copies) by Appellee Salim Ahmed Hamdan (certificate of service dated 8/29/05) to a response to the motion stay mandate [913394-1]. (lej)
9/8/05	OPPOSITION filed [919976-1] (5 copies) by Appellants Donald H. Rumsfeld, et al. (certificate of service dated 9/8/05) to a non-party to intervene [915466-1] filed by Rami Bin Saad Al Oteibi. (mcm)
9/12/05	OPPOSITION filed [919980-1] (5 copies) by Appellee Salim Ahmed Hamdan (certificate of service dated 9/12/05) to a non-party motion to intervene [915466-1]. (mcm)
9/13/05	REPLY filed [919985-1] (5 copies) by Movant-Intervenor Rami Bin Saad Al-Oteibi (certificate of service dated 9/13/05) to a response to the non-party motion to intervene [915466-1]. (mcm)
10/11/05	PER CURIAM ORDER filed [924000] denying non-party motion to intervene [915466-1] filed by Rami Bin Saad Al-Oteibi . The Clerk is directed to return to movant-intervenor the lodged motion to recuse [915472-1]. Before Judges Randolph, Williams. [Entry Date: 10/11/05] (mcm)

11/10/05	NOTICE filed by the Supreme Court that a petition for writ of certiorari was granted. [933893-1] (lej)
11/23/05	PETITION filed (Copies: 19) by Denied Movant-Intervenor Rami Bin Saad Al-Oteibi (certificate of service mailed 11/23/05) for rehearing en banc [935635-1] of 10/11/05 order denying leave to intervene for limited purpose of filing a motion to recuse. (mcm)

THE WHITE HOUSE

WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by

terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

   a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

   b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

   c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

   d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note

that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.
4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.
5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.
6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

/s/ George Bush

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, a resident of the State of Washington, as next friend for SALIM AHMED HAMDAN,

Military Commission Detainee, Camp Echo, Guantanamo Bay Naval Base, Guantanamo Bay, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States,

Respondents.

NO. CV04-0777L

PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. § 1361 OR, IN THE ALTERNATIVE, WRIT OF HABEAS CORPUS

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PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C § 1361 OR, IN THE ALTERNATIVE, WRIT OF HABEAS CORPUS

COMES NOW, Petitioner Charles Swift, Lieutenant Commander, Judge Advocate Generals Corps, United States Navy, by and through the undersigned counsel and, acting as "next friend" to and on behalf of Salim Ahmad Hamdan, files this Petition for Writ of Mandamus pursuant to 28 U.S.C § 1361 or, in the alternative, for a Writ of Habeas Corpus. Salim Ahmad Hamdan ("Mr. Hamdan") is one of six persons identified for trial by Military Commission. He is currently being held incommunicado in pre-trial custody by United States Military Authorities, including Respondents herein, at Naval Base Guantanamo Bay ("Guantanamo"). The incarceration of Mr. Hamdan under these circumstances violates the U.S. Constitution, U.S. law, and U.S. treaty obligations.

On November 13, 2001, President George W. Bush ("Respondent President Bush") issued a Military Order that authorized the use of military tribunals to try noncitizens accused of terrorism and other war crimes. *See* President George W. Bush's Military Order, Nov. 13, 2001, attached as Exhibit B to the Declaration of Lieutenant Commander Charles Swift ("Swift Decl."), filed herewith. In that same month, Afghan paramilitary forces captured Mr. Hamdan while he was attempting to flee with his wife and child from the ongoing military conflict in Afghanistan. Subsequently Mr. Hamdan was turned over to United States forces and eventually transferred to Guantanamo. On July 3, 2003, Respondent President Bush found that there was "reason to believe" that Mr. Hamdan was eligible for trial by military commission pursuant to his Military Order of November 13, 2001. *See* Press Briefing of Senior Department of Defense

("DOD") Official and Senior Military Officer, July 3, 2003, attached as Exhibit A to the Swift Decl.

In early December 2003, in preparation for trial by military commission, Mr. Hamdan was placed in Camp Echo, "*our facility where we hold the pre-commission detainees.*" Press Briefing of Army Major General Geoffrey D. Miller, Feb. 13, 2004, at 30, attached as Exhibit C to the Swift Decl. (emphasis added). Conditions in Camp Echo are tantamount to solitary confinement, in that Mr. Hamdan is held in isolation from all other prisoners and permitted no visitors except Lieutenant Commander Swift. Yet as of the date of this Petition, DOD still has not set a trial date or even advised Mr. Hamdan regarding the nature of the charges on which he is to be tried.

Lieutenant Commander Swift is under orders to serve as Defense Counsel within the Office of Military Commissions in the Office of the General Counsel of the United States Department of Defense, as established pursuant to the Military Order. *See* Official Change of Duty Orders for Lieutenant Commander Swift, Sept. 2003, attached as Exhibit F to the Swift Decl. On December 18, 2003, Lieutenant Commander Swift was assigned to serve as Mr. Hamdan's appointed military defense counsel and he continues to serve in that capacity as of the date of this Petition. Lieutenant Commander Swift is under legal and military obligation to zealously represent Mr. Hamdan's interests and as such is a proper "next friend" for the purpose of this Petition. Lieutenant Commander Swift is legally domiciled in the Western District of Washington State and is entitled to seek relief in this Court.

On January 30, 2004, Mr. Hamdan first met with his detailed defense counsel, Lieutenant Commander Swift. On February 12, 2004, Lieutenant Commander Swift submitted on behalf of Mr. Hamdan, under Article 10 of the Uniform Code of Military Justice ("UCMJ"), a demand for charges and a speedy trial. *See* Memorandum for the Appointing

Authority, Feb. 12, 2004, attached as Exhibit D to the Swift Decl. On February 23, 2004, the appointing authority responded by summarily denying Mr. Hamdan's right to a speedy trial. *See* Appointing Authority Opinion Letter, Feb. 23, 2004, attached as Exhibit E to the Swift Decl.

Denial of a speedy trial in Mr. Hamdan's case and his consequential prolonged detention in solitary confinement risks long-term psychological injury to Mr. Hamdan, and threatens to impair materially his ability to assist in the preparation of his own defense should charges ever be brought.

Lieutenant Commander Swift, as next friend to Mr. Hamdan, seeks a Writ of Mandamus or, in the alternative, a Writ of Habeas Corpus ordering Mr. Hamdan's release from pre-commission segregation and prohibiting further prosecution of his case before military commission for Respondent's failure to provide him a speedy trial as required by the UCMJ, military regulations including the Military Order, and the Geneva Conventions of 1949.

Furthermore, on behalf of Mr. Hamdan, Lieutenant Commander Swift seeks a Writ of Mandamus or a Writ of Habeas Corpus that prohibits the Respondents from using a military commission to try Mr. Hamdan, and that prohibits the indefinite detention of Mr. Hamdan for an unscheduled trial before such a commission, when such a commission will be held far beyond the theater of military operations and at a time when Congress has not declared war. Absent relief from this Court, such a commission would act without the necessary congressional approval, and would exist pursuant to a unilateral executive order that purports to suspend the right of the accused to seek habeas review before Article III courts. Indeed, it would also disregard fundamental precepts of equal protection by making only noncitizens subject to these military commissions. A military commission so constituted is an unprecedented, unconstitutional, and dangerously unchecked expansion of executive authority. As

such, the President's unilateral Military Order violates separation of powers and equal protection principles of the U.S. Constitution, and constitutes an illegal suspension of the writ of habeas corpus in violation of the suspension clause, U.S. Const. Art. I § 9, cl. 2, and therefore is an illegal and invalid basis for Mr. Hamdan's continued pre-commission segregation.

As part of these alternative grounds of relief, therefore, Lieutenant Commander Swift also challenges the attempt by Respondent President Bush to oust Article III courts of habeas corpus jurisdiction over prosecutions of individuals apprehended in the course of conducting military operations that occur within territories or leased properties of the United States, solely by labeling such persons as "enemy combatants" under the terms of the Military Order. Particularly because the duration of the war on terrorism is potentially never-ending, and where Respondents have incarcerated Mr. Hamdan without advising him of his status or even the charges on which he presumably will be tried at a place and time undisclosed, it is essential that the U.S. Constitution protect the accused against otherwise open-ended and unrestrained executive power, by assuring that an Article III court is permitted to exercise its time-honored civilian review of the military justice system that the United States Supreme Court has recognized to be essential since *In re Grimley*, 137 U.S. 147 (1890), and *Ex Parte Milligan*, 71 U.S. 2 (1866).[1]

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[1] Though this action may be understood as one seeking a writ of prohibition barring the trial of Petitioner by military commission, as opposed to a writ of mandamus compelling a federal officer to perform a nondiscretionary duty, the distinction between the two is of no moment. *See Calderon v. U.S. Dist. Court for Northern Dist. of Cal.*, 134 F.3d 981, 983 n.3 (9th Cir. 1998) ("The writ of prohibition is the 'fraternal twin' of its more familiar sibling, the writ of mandamus. . . . [and t]he two are evaluated under an identical standard." (citations omitted)). Because nearly all of the relevant precedents speak in terms of mandamus, this petition follows the more traditional nomenclature.

Lieutenant Commander Swift also seeks, on behalf of Mr. Hamdan, a Writ of Mandamus or a Writ of Habeas Corpus to prohibit the use of a military commission to detain or prosecute Mr. Hamdan because he is not within the jurisdiction of a military commission. Mr. Hamdan does not meet the criteria set out in the Military Order for identifying specific individuals who are subject to its terms. Such individuals include members of an organization recognized as a "terrorist" organization by the United States, combatants actively engaged in acts of war or violence against the United States, and those people who have participated in plans to kill or injure American citizens or to damage American property. Mr. Hamdan is not a member of a terrorist organization, he was not a combatant in Afghanistan at the time of his apprehension, he never has taken up arms against the United States, and he never has participated in any plan to kill or injure Americans or to damage American property.

I. JURISDICTION

1. This action arises under the Constitution, laws, and treaties of the United States, including Articles I, II, III, and VI, and Amendments 5 and 14 of the U.S. Constitution, 28 U.S.C. §§ 1361, 1391, 2241 and 2242, 5 U.S.C. § 702, the All Writs Act, 28 U.S.C. § 1651, 42 U.S.C. § 1981, and the Geneva Conventions.

2. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1361 and 1391, as well as 28 U.S.C. § 1331, and may grant relief pursuant to those statutes as well as 28 U.S.C. § 2241, 5 U.S.C. § 702, and the All Writs Act, 28 U.S.C. § 1651. Indeed, three of the five independent grounds for habeas jurisdiction in 28 U.S.C. § 2241(c) are met in this case, subsections (1), (3), and (4). Counsel for Respondent President Bush has observed that such judicial review is available. *See* Alberto R. Gonzales, Editorial, *Martial Justice, Full and Fair*, N.Y. Times, Nov. 30, 2001, at A27 (stating that the Military Order "preserves judicial review in civilian courts" because it permits those arrested "by a

military commission . . . to challenge the lawfulness of the commission's jurisdiction through a habeas corpus action in a federal court"). Furthermore, Paragraph (a)12 of Article 2 of the UCMJ, 10 U.S.C. § 802(a)(12), grants jurisdiction over a petition for judicial review filed by or on behalf of parties incarcerated at Guantanamo.

3. This Court has personal jurisdiction over the parties. Lieutenant Commander Swift is a legal resident of the Western District of Washington. Respondents have substantial contacts with the State of Washington and its residents, and are officers or employees of the United States, or an agency thereof, acting in their official capacity or under color of legal authority throughout the United States, including the Western District of Washington.

II. VENUE

4. Venue is proper in the Western District of Washington for this mandamus action pursuant to 28 U.S.C. § 1391(e) as Lieutenant Commander Swift is a legal resident of the Western District, and Respondents are officers or employees of the United States, or an agency thereof, acting in their official capacity or under color of legal authority throughout the United States, including the Western District of Washington. Lieutenant Commander Swift, as next friend and representative of Mr. Hamdan's interests, is the appropriate person to choose a forum in this case as Mr. Hamdan is without the ability to initiate proceedings on his own behalf. Additionally, the Western District is also an appropriate venue to consider a Writ of Habeas Corpus under 28 U.S.C. §§ 1331 and 2241. *See Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 493-500 (1973); *Gherebi v. Bush*, 352 F.3d 1278, 1304-05 (9th Cir. 2003); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 587 (S.D.N.Y. 2002), *rev'd in part, Padilla v. Rumsfeld*, 352 F.3d 695 (2003), *cert. granted*, 124 S. Ct. 1353 (U.S. Feb. 20, 2004).

III. PARTIES

5. Petitioner Lieutenant Commander Swift is a resident of the Western District of Washington, having resided in the Western District immediately prior to going on active duty as a member of the United States Military. He continues to maintain his voter registration address in the Western District of Washington State, and has done so since 1990.

6. Mr. Hamdan is a native and citizen of Yemen. He was first taken into United States Military custody in November 2001 and has remained in the custody of the United States Government continuously since that date. Mr. Hamdan has no known family members within the United States or its territories.

7. Respondent Brigadier General Jay Hood is the Commander of Joint Task Force Guantanamo and is responsible for all matters concerning persons detained as enemy combatants in Guantanamo. General Hood's predecessor, Brigadier General Jeffrey Miller, ordered the placement of Mr. Hamdan in pre-trial segregation in Camp Echo where Mr. Hamdan currently is confined.

8. Respondent Donald H. Rumsfeld is the Secretary of Defense of the United States, serving at the pleasure of Respondent President Bush, and is ultimately responsible for the administration of the United States Military, including the Office of Military Commissions. As such, Mr. Rumsfeld has full custodial authority over Mr. Hamdan's continued detention and his announced prosecution.

9. Respondent John D. Altenburg, Jr., is the Appointing Authority for Military Commissions and exercises his authority over the entire military commission process, including over Mr. Hamdan and Lieutenant Commander Swift.

10. Respondent Brigadier General Thomas L. Hemingway is the Legal Advisor to the Appointing Authority.

11. Respondent George W. Bush is the President of the United States of America and Commander-in-Chief of the United States Military and the person who decreed the Military Order pursuant to which all Respondents have acted.

IV. STATEMENT OF FACTS

12. In the wake of the terrorist acts of September 11, 2001, the United States, at the direction of Respondent President Bush, initiated a military campaign against the Taliban, the organization then in governing power in Afghanistan. On September 18, 2001, Congress passed a "Use-of-Force" Resolution that authorized Respondent President Bush to use force against "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons." Joint Resolution 23, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("Use-of-Force Resolution").

13. In the course of the ensuing military campaign in Afghanistan that was conducted under the Use-of-Force Resolution, and as part of its effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely knit coalition of Afghani and other military groups opposed to the Taliban government.

14. In October or November 2001, while working as a civilian driver in Afghanistan, Mr. Hamdan was seized by soldiers loyal to the former king of Afghanistan, Zahir Shah. Those soldiers were searching for Arabs to sell to American forces then engaged in military action against the Taliban. *See* Affidavit of Salim Ahmed Hamdan at 10, attached as Exhibit B to the Declaration of Charles P. Schmitz, Ph.D., filed herewith.[2] Mr. Hamdan was delivered by the Afghani soldiers to the American forces.

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[2] Both the original Arabic Hamdan Affidavit and its English translation are being filed under seal in a manner consistent with the Classified Information Procedures Act, 18 U.S.C. app. 3 § 1 *et seq.*

15. Prior to his capture, Mr. Hamdan had been living and working in Afghanistan since 1996 or 1997. He initially had traveled to Afghanistan from his native Yemen in 1996 with the intention of entering Tajikistan, but his efforts to do so were unsuccessful. Mr. Hamdan subsequently accepted a job in Afghanistan as a driver on a farm owned by an individual he came to know as Osama Bin Laden. The job entailed driving Afghani workers back and forth between a local village and the farm. After several months working in that capacity, Mr. Hamdan occasionally was asked to drive Osama Bin Laden to various locations as part of his employment. *See id.* at 9.

16. During the period that he was employed by Osama Bin Laden as a civilian driver, Mr. Hamdan returned to Yemen twice for entirely personal reasons unrelated to his employment. The first occasion was in 1998 to be married, and the second occasion was in 2000 to attend the wedding of his brother-in-law and to participate in the Hajj, the annual pilgrimage to Mecca, which is a sacred holy event for persons of the Muslim faith such as Mr. Hamdan. In February of 2001, Mr. Hamdan returned to Afghanistan with his wife and daughter to continue working as a civilian driver. He was still working as a driver in October 2001 when American military action against the Taliban began. *See id.*

("CIPA"). Lieutenant Commander Swift adopts this procedure and hereby provides notice pursuant to CIPA § 5 in an abundance of caution. However, he does not believe that any of the information contained in this Petition, its attachments, or the supporting memorandum of law, contains any classified or protected material. In Lieutenant Commander Swift's view, any contention by Respondents that the material is protected would be without merit, as the Appointing Authority of DOD has given his permission to disclose publicly all facts alleged herein, and many other facts alleged herein have been publicly disclosed by Respondents themselves. *See, e.g.*, Press Briefing of Senior DOD Official and Senior Military Officer, Ex. A to the Swift Decl.; Press Briefing of Army Major General Geoffrey D. Miller, Ex. C to the Swift Decl.; Press Interviews attached as Exhibit G to the Swift Decl.

17. When Mr. Hamdan learned that Northern Alliance forces were attacking Kandahar, where his wife and two-year-old daughter then were residing, he borrowed a car for the purpose of evacuating them to Pakistan, with the intention of eventually returning with them to Yemen. Mr. Hamdan was able to drive his wife and daughter to Pakistan. Mr. Hamdan then drove back to Afghanistan to return the car to its owner and to sell his personal belongings in order to finance his family's return to Yemen. It was on this return trip to Afghanistan that Mr. Hamdan was seized by Afghan paramilitary forces and subsequently delivered into the custody of United States Military forces. *See id.* at 9-10.

18. Since his capture in Afghanistan and his surrender to the United States, Mr. Hamdan continuously has been in the physical custody of the United States Military. He has been detained by Respondents now for more than two years. He currently is being detained unlawfully in pre-commission segregation at Camp Echo, a separate confinement facility apart from the Camp Delta detention center located in Guantanamo. Mr. Hamdan is under the direct control of Respondents and their agents.

19. Mr. Hamdan is not, and never has been, an enemy alien or unlawful combatant of the United States. He never has been a member of Al Qaida or any other organization recognized as a terrorist group by the United States. He never has taken up arms against the United States, or knowingly participated in any way in any plan to kill or injure Americans, or to damage American property, and he has not knowingly assisted anyone in such efforts. Furthermore, Mr. Hamdan did not plan, authorize, commit, or aid in the terrorist attacks against the United States that occurred on September 11, 2001, and he has not "harbored" anyone who had done so. *See id.* at 12.

20. Nevertheless, acting under the Military Order, in July 2003, approximately 20 months after Mr. Hamdan's apprehension or arrest, Respondent President Bush decreed

Mr. Hamdan one of six "enemy combatants" eligible to be tried before a military commission. *See* Military Order, Ex. B to the Swift Decl.; Press Briefing of Senior DOD Official and Senior Military Officer, Ex. A to the Swift Decl.; Press Briefing of Army Major General Geoffrey D. Miller, Ex. C to the Swift Decl.; Press Interviews, Ex. G to the Swift Decl. Pursuant to Respondent President Bush's unilateral determination, Mr. Hamdan was placed in pre-commission segregation in early December 2003. Pre-commission segregation entailed placing Mr. Hamdan in solitary confinement and restricting his access to sunlight as well as limiting his physical activity and exercise. *See* Press Briefing of Army Major General Geoffrey D. Miller, Ex. C to the Swift Decl.

21. On December 18, 2003, the Chief Defense Counsel for Military Commissions detailed Lieutenant Commander Swift to serve as Mr. Hamdan's appointed military defense counsel. *See* Appointment Letter, Dec. 18, 2003, attached as Exhibit H to the Swift Decl. Prior to that date, Mr. Hamdan was unrepresented by counsel and had no access to legal representation.

22. Lieutenant Commander Swift met with Mr. Hamdan at Guantanamo for the first time during the last weekend of January 2004. He subsequently met with Mr. Hamdan during the first and last weekends of February 2004 and during the third weekend of March 2004. During these meetings, Mr. Hamdan authorized Lieutenant Commander Swift, in writing, to serve as next friend for the purposes of bringing this Petition. See Next Friend Authorization attached as Exhibit I to the Swift Decl.

23. On February 12, 2004, Lieutenant Commander Swift, acting on behalf of Mr. Hamdan, informed the Appointing Authority via the assigned Prosecutor that, pursuant to the UCMJ, Mr. Hamdan "demands to be informed of the specific charges against him or to be released from pre-commission segregation into general detention."

Memorandum for the Appointing Authority at 33, Ex. D to the Swift Decl.

24. On February 23, 2004, the Legal Advisor to the Appointing Authority responded to Lieutenant Commander Swift's Memorandum with an Opinion Letter that asserted that the UCMJ does not apply to Mr. Hamdan's detention. This assertion was not supported by any legal argument or any citation to authority. *See* Appointing Authority Opinion Letter, Ex. E to the Swift Decl. For all practical purposes, Mr. Hamdan's demand that charges be brought, that he be informed of such charges, and that trial on such charges occur were ignored as if Mr. Hamdan had no rights at all.

25. The logical result of Respondents' conduct to date with regard to Mr. Hamdan is he could serve a potential life sentence without ever being charged with a crime and without being afforded a chance to prove his innocence. Absent relief from this Court, Mr. Hamdan may remain in custody without charges being filed or trial being afforded for the indefinite future, without any recourse to judicial review or any other check or balance on the power of the Executive Branch to keep Mr. Hamdan incarcerated under conditions of its unilateral choosing. The status quo also threatens to coerce unlawfully an admission of wrongdoing from Mr. Hamdan. Indeed, Respondents have informed Mr. Hamdan that he shall remain in custody until such time as he wishes to plead guilty to some unspecified crime against the United States in a manner satisfactory to Respondents, and that his appointed defense counsel is not authorized to mount any legal defense to either his detention or the circumstances of his incarceration, but rather is available only to assist Mr. Hamdan in pleading guilty to some unspecified offense. The treatment of Mr. Hamdan to date and the potential for further abuse strike at the heart of the Constitution's Founders' fears about trial delay – a fear recognized in more modern times by the drafters of the UCMJ.

26. Mr. Hamdan's transfer into pre-commission segregation at Camp Echo sets him apart from the approximately 600 individuals who have been detained at Camp Delta, Guantanamo, in that Mr. Hamdan is being detained for trial.

27. Mr. Hamdan's current conditions of confinement place him at significant risk for future psychiatric deterioration, possibly including the development of irreversible psychiatric difficulties. *See* Declaration of Dr. Daryl Matthews ("Matthews Decl."), filed herewith, at 4, ¶ 14.

28. Mr. Hamdan's current conditions of confinement in conjunction with the restrictions imposed on his legal representation by DOD make him particularly susceptible to mental coercion and false confession in conjunction with his trial before a potential military commission. *See id.*; Target Letter, Dec. 15, 2003, at ¶ 3 attached as Exhibit J to the Swift Decl.[3]

29. Mr. Hamdan's current conditions of confinement also may cause mental deterioration to the point of significant impairment of his ability to assess his legal situation and to assist in his own defense. *See* Matthews Decl. at 4, ¶ 15.

30. Mr. Hamdan's array of pre-isolation stressors place him at particularly high risk, as does the psychological stress of the uncertainty he faces due to the lack of charges against him and the nature and duration of his future confinement. *See id.*

V. EXHAUSTION OF REMEDIES

31. Lieutenant Commander Swift, acting on behalf of Mr. Hamdan, communicated his legal challenge to the pre-commission detention of Mr. Hamdan to the Appointing Authority, but was rebuked without recitation to any legal

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[3] In an abundance of caution, Petitioner also has filed the Target Letter under seal pursuant to CIPA § 5.

reasoning or legal citation. *See* Appointing Authority Opinion Letter, Ex. E to the Swift Decl. (denying speedy trial claim and applicability of UCMJ). There is no military commission in existence today in which a legal challenge may be raised, and until charges are brought against Mr. Hamdan, no military commission will exist in which he can seek relief. Accordingly, Lieutenant Commander Swift has exhausted any remedies that would be an alternative to this Petition. Because the injury to Mr. Hamdan arises from the Executive Branch's unlawful assertion of authority, and because he is not being held in a state but rather within a territory or leased property of the United States, only the federal courts can provide a remedy in this case.

VI. CLAIMS FOR RELIEF

COUNT ONE

DENIAL OF A SPEEDY TRIAL IN VIOLATION OF ARTICLE 10 OF THE UNIFORM CODE OF MILITARY JUSTICE

32. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 though 31 above.

33. The Military Order pursuant to which Mr. Hamdan has been detained for trial purports to be based, in part, on congressional authorization embodied in selected provisions of the UCMJ. In promulgating the Military Order, Respondent President Bush relied, in part, on his authority under 10 U.S.C. § 836, which allows the Executive Branch to prescribe rules for military commissions, so long as they are not inconsistent with the UCMJ. *See* Military Order at 15, Ex. B to the Swift Decl. However, Article 10 of the UCMJ, 10 U.S.C. § 810, provides that any arrest or confinement of an accused must be terminated unless charges promptly are brought and made known to the accused, and speedy trial afforded for a determination of guilt on such charges:

> When any person subject to this chapter is placed in arrest or confinement prior to trial,

> immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him.

10 U.S.C. § 810.

34. Mr. Hamdan is a person subject to the UCMJ by virtue of Respondent President Bush's Military Order, as well as by virtue of Article 2 of the UCMJ, 10 U.S.C. § 802(a)(12), which provides that "persons within an area leased by or otherwise reserved or acquired for the use of the United States" and under the control of any of the various branches of the military are subject to the UCMJ.

35. Courts have recognized that delays of the type imposed on Mr. Hamdan are intolerable in the absence of extraordinary or compelling circumstances, and Respondents have provided no reason whatsoever for their indefinite delay in charging Mr. Hamdan. Because Respondents did not take "immediate steps . . . to inform" Mr. Hamdan "of the specific wrong of which he is accused," they now have a clear and nondiscretionary duty under the UCMJ to "release him" from his pre-commission confinement.

COUNT TWO

VIOLATION OF ARTICLE 103 OF THE THIRD GENEVA CONVENTION AND UNITED STATES GOVERNMENT REGULATIONS

36. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 35 above.

37. The lengthy pre-trial confinement of Mr. Hamdan violates Article 103 of the 1949 Geneva Convention, as well as United States Government regulations. Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3394, 75 U.N.T.S. 135, provides that

> [j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as

> circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. *In no circumstances shall this confinement exceed three months.*

(Emphasis added.) Additionally, Article 5 of the Geneva Convention states:

> [S]hould any doubt arise as to whether persons . . . belong to any of the categories [entitled to protection as a POW under the Convention], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

38. Likewise, Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6(a) (1997), at 70, attached as Exhibit K to the Swift Decl, requires that United States military forces abide by the provisions of Article 5 of the Geneva Convention. Finally, Department of the Navy, NWP 1-14M: The Commander's Handbook on the Law of Naval Operations 11.7 (1995), at 77, attached as Exhibit L to the Swift Decl., states that "individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated."

39. Again, defendants have a clear nondiscretionary duty to release Mr. Hamdan under the Geneva Convention and under the United States Government's own regulations because he has been detained in pre-commission segregation for more than three months.

COUNT THREE

VIOLATION OF COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS

40. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 39 above.

41. Even the few individuals who lack Article 5 and Article 103 protections of the Third Geneva Convention are entitled to the protection of Common Article 3 of that treaty. Common Article 3 prohibits the contracting parties from "the passing of sentences . . . without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people."

42. In this case, the lengthy pre-trial confinement of Mr. Hamdan without charge, and without process to contest his guilt, amounts to an arbitrary and illegally imposed sentence that is incompatible with fundamental guarantees of due process recognized by all civilized people.

COUNT FOUR

CONSTITUTIONAL VIOLATION: ESTABLISHMENT OF MILITARY COMMISSIONS IN VIOLATION OF SEPARATION OF POWERS

43. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 though 42 above.

44. Mr. Hamdan's detention is unlawful because he is being detained to face charges before a military commission that is itself the product of unconstitutional Executive Branch action. Respondent President Bush's Military Order providing for the establishment of military commissions is ultra vires and void, because it is an unconstitutional exercise of legislative and judicial power by the Executive Branch. The Constitution vests "All legislative Powers" in Congress, and requires, at a bare minimum, that unlawful conduct be defined in advance, either by positive legislation, or by reference to a recognized body of international law.

45. Article I of the Constitution grants Congress, not the Executive, the power "To define and punish . . . Offences against the Law of Nations" and "To constitute Tribunals inferior to the Supreme Court." Accordingly, absent circumstances so exigent as to demonstrably rule out resort to Congress, that lawmaking body and not the Chief Executive must be the authorizing agent of the military commissions and the body that defines the offenses for which an accused will be answerable before such commissions. Neither the Use-of-Force Resolution nor any other act of Congress grants to the Executive Branch under the circumstances presented here the authority to establish military commissions, or to define the offenses that will be subject to their exclusive jurisdiction.

46. In addition to enabling the unlawful exercise of legislative powers, the Military Order also purports to suspend the Writ of Habeas Corpus and to circumscribe the jurisdiction of the federal courts in violation of Art. I § 9 and Art. III § 2 of the Constitution, by denying to persons held subject to the Military Order any access, remedy, or proceeding before "any court of the United States." Military Order at § 7, Ex. B to the Swift Decl. To allow the Chief Executive to proceed in this manner to dismantle the jurisdiction of the federal courts, redesigning the very architecture of American justice, is to succumb to an executive unilateralism decried by both our Founders and twentieth-century courts, and all who came between. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Respondents are under a clear and nondiscretionary duty to obey the Constitution and its foundational command of the separation of powers.

COUNT FIVE

CONSTITUTIONAL VIOLATION: TRIAL BEFORE MILITARY COMMISSIONS IN VIOLATION OF EQUAL PROTECTION

47. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 46 above.

48. Mr. Hamdan is being detained under the authority of a Military Order that violates Mr. Hamdan's right to equal protection of the laws of the United States. Mr. Hamdan may only be held for trial by a military commission by dint of his noncitizenship. The Military Order, by its terms, applies only to noncitizens. The Military Order is, to the best of Petitioner's understanding, the first of its kind to make this citizen/alien distinction. It runs afoul of the very purpose of the Equal Protection Clause of the United States Constitution. The Framers of the Clause understood that discrimination against aliens was pervasive and problematic and therefore intentionally extended the reach of the Clause to "persons" rather than confining it to "citizens." Foremost in their minds was the language of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1856), which had been utilized to limit due process guarantees by framing them as nothing more than the "privileges of the citizen."

49. The Military Order reverts back to an antebellum concept of fundamental rights, one in which aliens are singled out for lesser forms of justice than other citizens. While the government is given considerable latitude in areas such as immigration, under the Constitution there is little or no room for government by approximation when it puts people on one side or the other of a crude line that differentiates between individuals who are given access to the fundamental protections of civilian justice (including indictment, a jury trial presided over by a judge not answerable to the prosecutor, and access to an appeal before a commission independent of the prosecuting authority) and those afforded only a distinctly less protective and inferior brand of adjudication.[4] If the Executive Branch ever may

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[4] The Military Commission rules thus violate notions of procedural due process and Article III protections, not simply in the ways indicated

take such a step—shunting aliens into a procedure from which all U.S. citizens are spared—he may do so only upon a convincing showing of necessity that matches the claim of threat to the fact of alienage. This singling out of aliens for such fundamental disfavor might be justified in rare circumstances, but it is hard to imagine—and, absent explicit congressional action, impossible to assume that such circumstances are present today.

COUNT SIX

DETENTION IN VIOLATION OF 42 U.S.C. § 1981

50. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 49 above.

51. Mr. Hamdan is being detained under the authority of the Military Order which contravenes 42 U.S.C. § 1981. That fundamental statutory provision guarantees equal rights for all persons to give evidence, to receive equal benefit of all laws and proceedings for the security of persons, and to receive like punishment. Mr. Hamdan is being unlawfully detained for purposes of trial by military commission because he is a noncitizen—a citizen who committed the very same acts as Mr. Hamdan could not be detained under the Military Order and held for trial before a military commission.

COUNT SEVEN

CONSTITUTIONAL AND STATUTORY VIOLATION: INVESTING MILITARY COMMISSIONS WITH SUBJECT-MATTER JURISDICTION CONTRARY TO THE RECOGNIZED LAWS OF WAR

52. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 51 above.

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above, but also in matters such as access to exculpatory evidence and the right to confront witnesses. Were a trial of Mr. Hamdan ever to take place before a military commission, Petitioner expects that those matters would become the subject of collateral attack.

53. In the Military Order, the Respondent President Bush purports to derive his authority, in part, from provisions of the UCMJ that he claims authorize the use of military commissions in accordance with the laws of war.

54. The jurisdiction of military commissions is strictly limited to (1) violations of the laws of war, or (2) other crimes occurring during or in the immediate aftermath of a declared war while United States forces occupy, and hence must adequately police, territory captured from the enemy. As a plurality of the Supreme Court held in *Reid v. Covert*, 354 U.S. 1, 21 (1957),

> [t]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8 [granting Congress the power to "define and punish. . . Offences against the Law of Nations"], and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

55. In the present case, by identifying as individuals subject to its terms anyone who "is or was a member of the organization known as al Qaida," the Military Order unlawfully invests military commissions with jurisdiction far exceeding that recognized under the customary laws of war and the UCMJ.

56. Moreover, there is no indication that Mr. Hamdan has committed any offense as to which a military commission might have jurisdiction to try him. Thus, even if Respondent President Bush is deemed to have been granted congressional authorization to establish military commissions, he has unlawfully exceeded that authorization by expanding the

jurisdiction of the commissions beyond all legitimate bounds. Such conduct violates both the UCMJ and the Separation of Powers mandated by the U.S. Constitution.

COUNT EIGHT

THE APPOINTING AUTHORITY, AND ANY MILITARY COMMISSION THAT MAY BE ESTABLISHED, LACKS PERSONAL JURISDICTION OVER MR. HAMDAN

57. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 56 above.

58. Before a military commission can lawfully assert jurisdiction or detain Mr. Hamdan, the Military Order requires Respondent President Bush to have reason to believe that Mr. Hamdan:

> (i) is or was a member of the organization known as al Qaida;
>
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> (iii) has knowingly harbored one or more individuals described [in the categories above].

Military Order at § 2(a)(1), Ex. B to the Swift Decl.

59. Mr. Hamdan meets none of the criteria set forth in the Military Order to identify individuals subject to its terms. Respondents have come forward with no evidence to justify detention of Mr. Hamdan pursuant to the Military Order, and have adopted a process and procedure whereby they never will be required to do so and, absent relief from this Court, whereby Mr. Hamdan never can compel them to do so.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief:

1. Grant Petitioner Lieutenant Commander Charles Swift "next friend" status as next friend of Salim Ahmed Hamdan;

2. Award the Writ of Mandamus or issue an Order directing the respondents to show cause why the writ should not be granted.

3. If an Order to show cause is issued, to include as part of the Order a prompt schedule to receive briefing from the parties, including a Response from Respondents, and a Reply from Petitioner, on the issues raised in this Petition, followed by a hearing before this Court on any contested factual or legal issues, and production of the body of Mr. Hamdan as appropriate;

4. After notice and hearing, determine that Mr. Hamdan has been denied a speedy trial; that his incarceration violates the Constitution, laws, treaties and regulations of the United States; that the Military Order is unconstitutional; and that Respondents have no jurisdiction over Mr. Hamdan.

5. After notice and hearing, issue a Writ of Mandamus that directs Respondents to obey their clear, nondiscretionary duty to follow the Constitution, laws, regulations, and treaties of the United States, and therefore to release Mr. Hamdan from Camp Echo and from further solitary confinement;

6. After notice and hearing, issue a Writ of Mandamus that orders Respondents not to use the Military Order of November 13, 2001 to detain or bring charges against Mr. Hamdan or anyone else in a Military Commission because that Order violates the U.S. Constitution, U.S. law, and U.S. treaty obligations, both facially and as applied to Mr. Hamdan, and is therefore ultra vires and illegal;

7. Order Respondents promptly to justify as lawful any continued detention of Mr. Hamdan;

8. Enter an Order that the Court shall retain jurisdiction over this matter to permit Mr. Hamdan to respond to arguments advanced by Respondents on matters related to his continued detention;

9. In the absence of adequate justification, order Mr. Hamdan's release; and

10. Grant such other and further relief on behalf of Petitioner and against Respondents as this Court deems just and proper, including but not limited to, as an alternative to a Writ of Mandamus, a Writ of Habeas Corpus.

DATED: April 6, 2004.

NEAL KATYAL

By /s/
Neal Katyal, D.C. Bar #462071
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9000
Attorney for Petitioner
Pro Hac Vice Application
Pending

LIEUTENANT COMMANDER CHARLES SWIFT

By /s/
Lieutenant Commander
Charles Swift,
N.C. Bar #21084
Next Friend of Salim Ahmed Hamdan
Pro Hac Vice Application
Pending

PERKINS COIE LLP

By /s/ [Harry H. Schneider, Jr.]
Harry H. Schneider, Jr.,
WSBA #9404
Joseph M. McMillan,
WSBA #26527
David R. East, WSBA #31481
Charles C. Sipos, WSBA #32825
Attorneys for Petitioner

VERIFICATION

I, Lieutenant Commander Charles Swift, hereby declare under penalty of perjury that to the best of my knowledge and belief the matters set forth in the foregoing Petition for Writ of Mandamus, or, in the Alternative, Writ of Habeas Corpus, are true and correct.

/s/
Lieutenant Commander Charles Swifts
Next Friend of Salim Ahmed Hamdan

VERIFICATION

I, Neal Katyal, hereby declare under penalty of perjury that to the best of my knowledge and belief the matters set forth in the foregoing Petition for a Writ of Mandamus, or, in the Alternative, a Writ of Habeas Corpus, are true and correct.

/s/
Neal Katyal

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, a resident of the State of Washington, as next friend for SALIM AHMED HAMDAN,

Military Commission Detainee, Camp Echo, Guantanamo Bay Naval Base, Guantanamo Bay, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States,

Respondents.

NO. CV04-0777L

DECLARATION OF LIEUTENANT COMMANDER CHARLES SWIFT

Lieutenant Commander Charles Swift hereby declares and states as follows:

1. I am over the age of eighteen (18) years. The following is true and correct to the best of my knowledge. I have personal knowledge of the matters stated herein and, if called upon to testify, could competently testify thereto.

2. I am presently serving on active duty with the United States Navy. I am currently stationed in the Office of the Chief Defense Counsel for Military Commissions, located at 1931 Jefferson Davis Highway, Suite 103, Arlington, VA 22202.

3. I originally entered military service in conjunction with attendance at the U.S. Naval Academy in Annapolis, Maryland. At the time I entered the Naval Academy, I resided with my parents in the state of North Carolina. I maintained North Carolina as my legal domicile throughout my academic career at the Naval Academy and my subsequent first term of active military service. I left active military service in June of 1990 to attend law school at Puget Sound School of Law in Tacoma, Washington. Puget Sound School of Law was acquired by Seattle University in 1994.

4. I established residency and legal domicile in the Western District of Washington, concurrent with my attendance of law school. In conjunction with the establishment of legal domicile in Washington State, I established a permanent residence, registered my vehicle, and registered to vote. Following graduation I re-entered active military service as a Judge Advocate in the United States Navy in November 1994. In conjunction with my acceptance into the Navy JAG Corps, I took and passed the North Carolina Bar Exam. I chose North Carolina as a matter of convenience because North Carolina results allowed me to enter the Basic Lawyer Course in November and North Carolina does not require bar fees or continuing education to remain in good standing for members in the military service. At the time that I took the North Carolina Bar Exam, I did not have nor have I since had an intention of practicing law in the state of North Carolina.

5. At the time of re-entry into the Naval service as a Judge Advocate, I listed my home of record as Washington State. I was initially stationed at Naval Legal Service Office Northwest, located in Bremerton, Washington. In November 1997, I was transferred pursuant to military orders to Naval Station Roosevelt Roads, Puerto Rico to serve as the station Judge Advocate. While in Puerto Rico, I resided in on-base housing, voted via absentee ballot in Washington State and Federal elections and continued to register the vehicle I had acquired in the state of Washington. In Puerto Rico, I registered a second vehicle acquired in Puerto Rico as a matter of convenience.

6. In July 2000, I was transferred to Naval Legal Service Office Detachment Mayport, Florida as the Officer-in-Charge. While in Florida, I again voted in state and federal elections via absentee ballot and continued to register my vehicle I had acquired in Washington. I also registered two other vehicles I acquired in Florida as a matter of convenience. Additionally I acquired a Florida driver's license as a matter of convenience. My Washington driver's license had expired and following the events of September 11, 2001, two forms of picture identification became standard for traveling. Consequently I chose to get a Florida drivers license based on my temporary residence to ensure that I had two forms of picture identification. In October 2003, I was then transferred to the Office of Military Commissions as Defense Counsel. I intend to vote in the upcoming state and federal elections via absentee ballot in the state of Washington. Upon my move to Northern Virginia, based on my temporary residency I re-registered my leased vehicle in Virginia as a matter of convenience.

7. At no relevant time have I ever sought or intended to change my legal domicile from the state of Washington. Throughout my present military service, Washington State has been the last place that I lived with intent to remain permanently.

8. Attached hereto as Exhibit A is a true and correct copy of the Press Briefing of Senior Department of Defense Official and Senior Military Officer, Jul. 3, 2004.

9. Attached hereto as Exhibit B is a true and correct copy of President George W. Bush's Military Order, Nov. 13, 2001.

10. Attached hereto as Exhibit C is a true and correct copy of the Press Briefing of Army Major General Geoffrey D. Miller, Feb. 13, 2004.

11. Attached hereto as Exhibit D is a true and correct copy of the Memorandum for the Appointing Authority, Feb. 12, 2004.

12. Attached hereto as Exhibit E is a true and correct copy of the Appointing Authority Opinion Letter, Feb. 23, 2004.

13. Attached hereto as Exhibit F is a true and correct copy of the Official Change Duty Orders for Lieutenant Commander Swift, Sept. 2003.

14. Attached hereto as Exhibit G is a true and correct copy of various Press Interviews of Lieutenant Commander Swift.

15. Attached hereto as Exhibit H is a true and correct copy of the Appointment Letter, Dec. 18, 2003.

16. Attached hereto as Exhibit I is a true and correct copy of the Next Friend Authorization.

17. Attached hereto as Exhibit J is a true and correct copy of the Target Letter, Dec. 15, 2003.

18. Attached hereto as Exhibit K is a true and correct copy of Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, § 1-6(a) (1997).

19. Attached hereto as Exhibit L is a true and correct copy of the Department of the Navy, NWP 1-14M: *Commander's Handbook on the Law of Naval Operations*, 11-3 (1995).

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 5th day of April, 2004.

/s/
Lieutenant Commander Charles Swift

Presenter: Senior Defense Official Thursday, July 3, 2003

Background Briefing on Military Commissions

Senior Defense Official: I just really wanted to put out some information very quickly and then we'll go right to questions and answers.

Today the President has determined that six enemy combatants currently detained by the United States are subject to his military order of November 13, 2001. The President determined that there is reason to believe that each of these enemy combatants was a member of al Qaeda or was otherwise involved in terrorism directed against the United States.

I think with that setup, there are obviously a lot of questions, I assume, on your mind and we'll be happy to take those.

Charlie?

Q: We assume that Dr. Wolfowitz will determine whether or not they will be subject to commissions. In other words, the President has determined that they are eligible to go before commissions, and the Pentagon now determines whether or not they will in fact be charged, what they will be charged with --

Senior Defense Official: Why don't I talk just a little bit about the process.

Senior Defense Official: I think you're in effect correct. In effect, it is a grant of jurisdiction over the person. Then after that the prosecution would look at the cases, determine if there were appropriate charges, would then present the charges to the appointing authority, and at that time it would be up to the appointing authority, Dr. Wolfowitz in this case, who would determine whether or not to approve the charges and perhaps to appoint a commission and refer those charges to the commission.

Q: These six, we assume, are among those held at GTMO, and why these six? Are the things that they have done especially egregious to single them out?

Senior Defense Official: It's really not so much -- These are people among others who have been evaluated. There are a lot of factors. The quality of the evidence we have against them, how far along we are in intelligence gathering, and it's really mostly that these are people who are available, and according to the process we've established for gathering this information we've determined that we have sufficient action -- The President has indeed determined that he's got reason to believe that they are as I described them.

Q: And they are at GTMO. They're among those being held at GTMO?

Senior Defense Official: We're not talking about the individual cases and I don't think we need to discuss exactly where they're being held because that's a little bit more specificity than I think we're prepared to discuss.

Q: Will they be moved from wherever they are now, assuming GTMO, to a regular military prison?

Senior Defense Official: I think that also would be premature to discuss that since in fact there have been no charges approved in any of these cases, nor has there been a commission appointed or any specific directions given by the appointing authority. So at this juncture we just don't have --

Q: How fast do you expect that to happen?

Senior Defense Official: Again, I think it would be best -- We'll discuss process and the kinds of things that can happen because there will be so many factors involved in --

Q: Should we see something before the end of the year, or is this going to be --

Senior Defense Official: -- kinds of steps that are involved. Again, repeating what we told Charlie.

Q: I wrote it down. So what about timeline? Will it take six months to do this or is it going to be on a fast track? We

have the what, where, when, why thing, and this is the when part. So when?

Senior Defense Official: It's like a what part, too. We gave you a lot of what --

Senior Defense Official: As you can tell in the past we've been proceeding very methodically and deliberately and carefully and I think that that will continue to guide the military commission process. In that regard it probably wouldn't be prudent to set any kind of a timeline because the criminal justice system should not be driven by timelines, they should be driven by the facts of the case. That's what's the next step is for the chief prosecutor to look at the facts of the case and see if there are appropriate charges for those facts. So I think that's the reason we wouldn't want to set ourselves to a timeline. We want to look at each individual case on a case-by-case basis and do the right thing.

Q: Can you take us a little further on the who's and what's of these? Are they Afghan, are they al-Qaeda, are they terrorists that you found in this country?

Senior Defense Official: Again, we're not going to discuss particular aspects of any of the individual cases because it's just premature to do that.

Q: How about a ballpark? Are the majority of them one or the other?

Senior Defense Official: All I think we're really prepared to say is there's evidence that they may have attended terrorist training camps.

Q: In Afghanistan? And --

Senior Defense Official: I'm not going to discuss those kinds of details. They may have attended training camps, they may have been involved in the kinds of activities that are consistent with terrorist activities -- financing, recruiting. Those are the kinds of things that would lead us to the kind of determination that the President made today.

Do you have any more to add?

Senior Defense Official: I'd just say that is a summary of the kind of evidence involved in the six cases that we've seen come back from the President today. But we wouldn't want to discuss any specific case or a specific kind of evidence associated with those activities.

Q: Will you hold the trials in the same place if they are held? Will they be in GTMO, will they be in this country?

Senior Defense Official: Again, that's a decision that gets made at a later point in this process. That would be at the point when the appointing authority in fact refers charges to a commission.

Q: But not -- I mean are the options in this country or another country or --

Senior Defense Official: The military commission order that the Secretary of Defense signed March 21, 2002 and the Military Commission Instructions were written, designed to give us the flexibility to do what was appropriate in every case so we have a large range of options. That's why the rules were written the way they were written.

Q: Will we find out the identities of these people and the specificity of the charges when they are actually referred to a commission, when a commission is appointed? Or when?

Senior Defense Official: We may indeed at the time of charging provide that information. At the time of charging or perhaps at the time when a defense counsel would be assigned to an individual.

It would be inappropriate at this time since in fact no charges have been brought against any of these detainees.

Senior Defense Official: And let me just emphasize one point the Colonel made is that we may identify those things, and we may not. We will at the point of a commission should any of these get to a commission, the objective is as much transparency as practicable, and those are the kinds of things we consider at the time.

Q: So it's possible you won't ever identify them to us?

Senior Defense Official: I suppose that is possible. Yeah, I suppose that is possible.

Senior Defense Official: But the intent is, as directed by the Secretary of Defense, that these proceedings will be as open as practicable.

Senior Defense Official: Remembering again that one of the principal objectives of this third way, the President sought a third way, we have an Article 3 system of justice, we have courts-martial, a third way to be able to set up a body of rules that will allow us to protect information to achieve additional intelligence gathering purposes that may lead to the capture of more terrorists. So it's important to remember.

Q: Can you describe the makeup of a commission?

Senior Defense Official: In general, you mean?

Q: How these commissions will be made up.

Senior Defense Official: There may not be commissions in this case. It's important to keep that in mind. We may have commissions, we may not. But in general, commissions.

Senior Defense Official: Under the Military Commission Order No. 1 you see that the commissions are constituted by a three to seven member panel of commissioned officers from the armed forces, one of whom is a presiding officer who must be a judge advocate.

Q: And for a guilty verdict, what's the percentage of commission members that have to vote --

Senior Defense Official: A two-thirds vote of the three to seven member panel.

Q: Do the six know that they've been chosen?

[Laughter]

Senior Defense Official: Again, I don't think we want to answer specific questions that might involve those individuals.

Q: Can you say a little bit more about what this means in terms of status now or change of status? Are they still to be

described as enemy combatants? How should they be described then?

Senior Defense Official: Legally there is no change to the status. They are being held as enemy combatants right now. They are being held simply as a function of the war on terrorism and detained because they are a threat to the United States.

A criminal process has not begun in any of these cases. Again, it's a decision the President has made that's akin to a granting of jurisdiction but there's been no exercise of that jurisdiction so therefore no criminal process or rights and procedures that normally attend a criminal process are in place yet.

Q: So their right to representation doesn't start until they're charged?

Senior Defense Official: The way the order reads, they will be given a defense counsel sufficiently in advance of any trial to make sure that they can prepare an adequate defense. Certainly there's no trial that has been directed at this point in time.

Q: Are these six the first ones who've been put in this jurisdiction? And is it a rolling process where we might expect to see more down the line? Have you looked at the entire universe of enemy combatants and decided these are the only six that will --

Senior Defense Official: Yes, to both your questions. It is the first time that the President has made a "reason to believe" determination; and there may well be more.

Q: Secretary Wolfowitz, as I understand, sent a report over to the White House and gave reasons why the six should be eligible for possible commissions or possible trials. Were these six the only ones that were pulled initially? Or was there a large list and the President just picked six from it initially? Or are these six -- Are these the only six suggested initially?

Senior Defense Official: First of all, there are a number of factors beyond what may have been recommended from this building that have led to the President's determination that he has reason to believe that these are people engaged in terrorism against the United States. So it's more than just the recommendations or suggestions that may have come from here.

With regard to whether there are others that the President has considered, I don't think we have anything to say on that, do we?

Senior Defense Official: The only legally relevant thing that has happened today is the President's decision to provide these "reason to believe" determinations. It wasn't an action by the Pentagon.

Q: A couple of procedural questions.

The appointing authority is responsible both for deciding which if any of these half dozen are to be charged; and the appointing authority also is responsible for forming the commissions.

Should any of these be charged and decide to plead guilty, some sort of plea bargain, is it necessary for them to go before a commission to execute that bargain? Need there be a commission for a plea bargain to be finalized?

Senior Defense Official: Yes. The way the rules are written there needs to be a commission in any event. And in fact the commission does have responsibilities even for a plea agreement in that they have to determine whether or not a plea is voluntary and informed.

Q: And in the sequence of those two chores of the appointing authority, does either one necessarily come first? Deciding to charge somebody and then creating a commission? Must the commission be created first?

They're both chores in separate sections of the order.

Senior Defense Official: I think you've read the order correctly and the order does not specify a particular chronology as to how those events would have to occur.

Q: Lastly, if you had a couple of questions from here and there about where it could be and you're declining to say where, but someone said could they be brought to a military base, surely you can say you don't wish to bring them into U.S. territory after winning a case that says they have no habeas corpus rights outside of U.S. territory. You're not suggesting that's an open question to bring them to the United States --

Senior Defense Official: We're not suggesting anything with respect to locale. I think that's the way to take it. That's speculation on your part.

Senior Defense Official: In view of the day and the hour I think we probably have time for maybe two more.

Q: This might be putting the cart before the horse; but if no charges are preferred against one of these six or if they come through and the tribunal finds them not guilty, are they automatically set free? Or would they go back into detention for intelligence purposes?

Senior Defense Official: We can't really answer that right now.

I can say this, that as this process develops we certainly will be getting more information about those people. If one of them were to go through a commission process, at the end of that process we would know much more than we know now.

So any decision like that would have to be made at that time.

It would also be a bit misleading to say that we wouldn't consider sending one of these people before a commission. Certainly the acting chief prosecutor will be looking at potential charges on these cases that have had determinations made on them.

Senior Defense Official: Let me talk about one thing in terms of your question about after a potential commission what might happen. Remember the purpose of the commission, and that was to have a third way, something different, and the rules were structured in a very deliberate fashion but deliberately flexible. So there are a lot of things.

As the colonel said, there's going to be further intelligence gathering. And that, by the way, is the second point. A principal purpose of this third way is to be able to protect intelligence and what intelligence may be gathered during the process would help determine sort of the ultimate outcome of any of these individuals.

Q: So is it possible then that somebody could go through a commission, be found not guilty, and then have them say well, congratulations, you're not guilty but you're still an enemy combatant so back into wherever we're holding you?

Senior Defense Official: As a legal matter, they're two completely different questions. They're not being held because of any criminal activity or any charges. They're being held because they're enemy combatants in an ongoing armed conflict.

What we're talking about with military commissions is a criminal process so in that regard they're two distinct issues.

With respect to factually whether or not the Department of Defense would want to continue holding someone, that's an issue -- My only point there is if a military commission process starts up certainly the facts available to decision makers will be greater. So that's a decision they'll make at that point in time.

Senior Defense Official: Anything else?

Thank you very much. Have a great 4th of July.

Q: Is there any [inaudible], like does this set any kind of process going that says at the end of five years they have to be done or is it still open ended?

Senior Defense Official: The war on terrorism is open ended.

Q: All right.

November 13, 2001

President Issues Military Order

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other

cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling govern-ment interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be --

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for --

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority

of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense.

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to --

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order --

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental

authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

November 13, 2001.

Presenter: Paul Butler, PDASD (SO/LIC)
Friday, February 13, 2004 2:33 p.m. EST

Briefing on Detainee Operations at Guantanamo Bay

(Participating were Paul Butler, principal deputy assistant secretary of defense for special operations and low intensity conflict, and Army Maj. Gen. Geoffrey D. Miller, commander, Joint Task Force Guantanamo.)

Bryan Whitman [deputy assistant secretary of defense for public affairs (media operations)]: Good afternoon and thank you for joining us this afternoon.

As most of you know, the secretary of Defense is in Miami today and has just spoken to the Miami Chamber of Commerce. And he touched upon the importance and the progress that's being made in the global war on terror and discussed the importance of our detainee operations that are taking place at Guantanamo Bay.

And to provide some more information on that, because there has been some interest in it lately, we have two individuals: Paul Butler, who is the Principal Deputy to the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict; and Major General Geoffrey Miller, who is the Commanding General for Joint Task Force Guantanamo. And they're here today to talk to you about the importance of the Guantanamo facility and bring you up to date on some of our processes at that facility.

So with that, I'll turn it over to these two.

Butler: Good afternoon.

As the secretary indicated earlier today in his speech, the key insight I think into our policy at Guantanamo is that we remain in an active war with al Qaeda, the Taliban and its affiliated terrorist organizations.

And I think it helps just to remind ourselves on how we got here a little bit. And that is that in 1996, Osama bin Laden issued a public fatwa declaring war on the United States. In February 1998 he issued another public fatwa and said -- in which he said that it was the absolute obligation of his followers to kill Americans, civilian or military, wherever they could be found. After that followed the attempted millennium plot in 1999. Before that al Qaeda attacked our embassies in East Africa and killed over 200 people and injured close to 5,000. In October 2000, al Qaeda attacked the USS Cole, a warship in Aden, where they killed 17 service members and injured 39 others. Al Qaeda then made a recruiting video which celebrated that attack and was used as a recruitment tool for al Qaeda operatives.

And then, of course, there was 9/11, where close to 3,000 people died in one day on American soil; something that hadn't happened since Pearl Harbor in World War II; something that hadn't happened on the continental United States since the battle of Antietam; and an act that destroyed a building at the center of American power, which hadn't taken place since the War of 1812. Of course, the president responded pursuant to his duties as commander in chief. Congress endorsed the use of force in self-defense against those responsible for September 11th, and NATO and the U.N. Security Council both recognized 9/11 as an attack upon the United States.

In November of 2001, President Bush stated that, quote, "International terrorists have carried out attacks on the United States on a scale that has created a state of armed conflict that requires the use of United States armed forces." Close quote.

But unfortunately, that wasn't the end of the story. The war goes on. On December 22nd, 2001, there was an attempted bombing of a commercial transatlantic flight by shoe-bomber Richard Reid linked to al Qaeda.

In April 2002, there was an al Qaeda firebombing of a synagogue in Djerba Tunisia, which killed 19 people and

injured 22. In June 2002, al Qaeda was likely responsible for a bomb that exploded outside the U.S. consulate in Karachi, Pakistan, killing 11 persons and injuring 51 others. In October 2002, there was a recording attributed to Ayman al-Zawahiri, bin Laden's deputy, saying, "God willing, we will continue targeting the keys of the American economy." On October 6, 2002, al Qaeda directed a suicide attack on the French oil tanker MV Limburg off the coast of Yemen that killed one and injured four. On October 8, 2002, al Qaeda gunmen attacked U.S. soldiers on Failaka Island in Kuwait, killing one Marine and wounding another. On October 12, 2002, al Qaeda affiliate Jemaah Islamiyah bombed the nightclub in Bali, Indonesia, which killed more than 200 international tourists and injured about 300. On November 28th, 2002, in Mombasa, Kenya, a vehicle containing three suicide bombers drove into the front of the Paradise Hotel, killing 15 persons and wounding 40 others. Al Qaeda claimed responsibility. That same day, two anti-aircraft missiles were launched, but missed downing a Boeing 757 taking off from Mombasa on route to Israel. Al Qaeda claimed responsibility for that as well.

On May 12th in 2003, in Saudi Arabia, al Qaeda suicide bombers attacked three residential compounds for foreign workers, killing 34, including 10 U.S. citizens. On August 5th, 2003, a car bomb exploded outside the J.W. Marriott Hotel in Jakarta, Indonesia, killing 10 and wounding 150. Once again, al Qaeda-affiliated group Jemaah Islamiyah was responsible.

Between February and October of 2003, bin Laden issued further tapes urging his followers to take up jihad and stating, "We stress the importance of the martyrdom operations against the enemy, operations that inflicted harm on the United States."

Between September 2003 and December 2003, Taliban militants stepped up the insurgency in southern and eastern provinces in Afghanistan, including attacks on innocent

civilians and coalition forces. On November 15th, 2003, two suicide truck bombs exploded outside the Neve Shalom and Beth Israel Synagogues in Istanbul, killing 25 and wounding 300 more. An al Qaeda-related group claimed responsibility. On November 20th, 2003, two suicide truck bombs exploded near the British consulate and the HSBC Bank in Istanbul, killing 25, including the British consul general, and injuring more than 309. Al Qaeda claimed responsibility. In November 2003, Taliban bombings killed U.S. and Romanian soldiers and several Afghan civilians. In November 2003, al Qaeda also struck again in Riyadh, Saudi Arabia, killing 17 and injuring more than 100. In January 2004, Taliban bombings in Afghanistan killed soldiers from the United Kingdom and Canada. And since August of 2003, 11 U.S. soldiers have died in the war in Afghanistan.

This is not even a full, comprehensive listing of all the attacks but surely indicates that we remain at war with Osama bin Laden and al Qaeda. So when you put it in that context, what we're doing at Guantanamo Bay is not that surprising. We are holding enemy combatants in a global war on terrorism for security reasons, to prevent them from returning to the battlefield and injuring American soldiers and civilians -- and civilians throughout the world.

So the law of armed conflict governs what we're doing here. Some people ask us, well, what about the Geneva Convention? And we believe that we -- our policies are treating the detainees entirely consistent with the framework of the Geneva Convention. The Geneva Convention requires that combatants in a war fight according to certain rules, and there are several reasons why the enemy combatants at Guantanamo are not entitled to the full range of protection under the Geneva Conventions.

First of all, neither al Qaeda nor the Taliban were state parties to the Geneva Conventions. Second of all, they did not fight in uniform or subject to a clear chain of command. But most importantly, the Geneva Conventions were

designed in large part to protect civilian populations, and al Qaeda, the Taliban and its affiliates, as you can see by that litany of events, deliberately violates those rules. Not only do they attack civilian populations, but they blend in with civilian populations, thereby increasing the possibility of civilian casualties. If the Geneva Conventions are to be enforceable law, there need to be incentives built in. And what kind of incentives would we send if we allow the full treatment under the Geneva Conventions to be extended to enemy combatants who deliberately and purposely violate them?

However, we are treating the detainees at Guantanamo Bay humanely and consistent with the conditions under customary international law for humane treatment. The detainees are getting three meals a day that meet cultural dietary requirements, they have adequate shelter and clothing, the opportunity to worship, including copies of the Koran and prayer beads, the means to send and receive mail, reading materials, and excellent medical care.

There is also a thorough process to determine who comes to Guantanamo. The secretary described this in his speech a little bit, but I'd like to give a little bit more detail.

First of all, there is an elaborate screening process that takes place in the field in Afghanistan. Over 10,000 detainees were taken into some form of custody; less than 800 have been brought to Guantanamo Bay. First, in a hostile environment, soldiers detain those who are posing a threat to U.S. and coalition forces based on available information or direct combat.

After an initial period of detention, the individual is sent to a centralized holding area. At that time, a military screening team at the central holding area reviews all available information, including interviews with the detainees.

With assistance from other U.S. government officials on the ground, including military lawyers, intelligence officers

and federal law enforcement officials, and considering all relevant information, including the facts from capture and detention, the threat posed by the individual and the intelligence and law enforcement value of the individual, the military screening team assesses whether the detainee should continue to be detained and whether transfer to Guantanamo is warranted.

A general officer designated by the commander of Central Command then makes a third assessment of those enemy combatants who are recommended for transfer to Guantanamo Bay. The general officer reviews recommendations from the central holding area screening teams and determines whether enemy combatants should be transferred to Guantanamo. In determining whether a detainee should be transferred, the combatant commander considers the threat posed by the detainee, his seniority within hostile forces, possible intelligence that may be gained from the detainee through questioning, and any other relevant factors.

Once that determination is made, Department of Defense officials in Washington also review the proposed detainee for transfer to Guantanamo. An internal Department of Defense review panel, including legal advisors and individuals from policy and the Joint Staff, assess the information and ask questions about whether the detainee should be sent. There is also -- that's part of the process.

Now, what happens once the detainee arrives at Guantanamo? Once the detainee is at Guantanamo, there is a very detailed and elaborate process for gauging the threat posed by each detainee to determine whether, notwithstanding his status as an enemy combatant, he can be released or transferred to the custody of a foreign government consistent with our security interests.

Each individual case is reviewed by an integrated team of interrogators, analysts, behavioral scientists and regional experts. Individual detainee cases are assessed according to

the threat posed to the national security interests of the United States and our allies. Threat assessments are based on all available information from interagency sources and are provided to Southern Command for review.

During questioning of the detainees, new information is constantly revealed, confirmed and analyzed to determine its reliability. Unfortunately, many detainees are deceptive and prefer to conceal their identities and actions. Some of you may be familiar with a document called the Manchester Manual. This was a document that was picked up in a search in Manchester, England and has surfaced in various other venues, including in Afghanistan. It's really the al Qaeda manual, and in it is a large section which teaches al Qaeda operatives counterinterrogation techniques: how to lie, how to minimize your role.

The commander of Southern Command or his designee then makes a recommendation in each individual case based on the threat the detainee poses to the United States as well as intelligence value or law enforcement interest. Those recommendations are then sent up to the Pentagon, where a group -- a panel of experts from the Pentagon -- from Policy, from Joint Staff, from the Office of General Counsel -- collect that information and make a recommendation on whether the detainee should be released, transferred to the custody of a foreign government or continue to be detained.

Those recommendations are then sent out to an interagency experts group, composed of -- not only of the Department of Defense, but the Department of Justice, including the FBI; the CIA; the Department of State; the Department of Homeland Security; and NSC staff. Each one of the interagency experts votes on the recommendation and the entire package is then sent up to the Secretary of Defense or his designee for review. A decision is then made on whether somebody will be released, transferred or remain in detention.

There are two components down in Guantanamo that actually do this work. There is General Miller, the commander of JTF-GTMO, and his military intelligence teams that are debriefing the detainees for intelligence purposes. There is also a separate team called the Criminal Investigative Task Force, which is made up of components of Army CID, Air Force OSI, Navy NCIS, FBI and other law enforcement agencies, who also evaluate each detainee for threat and whether there is law enforcement interest.

I'd like to talk a little bit now about the process for transferring detainees. As you know, there have been over 80 detainees who have been released. There have been now five who have been transferred, including four to Saudi Arabia and recently one to Spain. Various factors must be considered before any decision to transfer to a foreign government is reached, including the threat posed by the detainee, any law enforcement interest in him or intelligence interest in him, and whether we can reach appropriate transfer agreements with the foreign government. This is a complex process, and we're actively involved in negotiations with many different countries about transferring their detainees to their custody. But we want -- we're asking foreign governments to take responsibility for these detainees, to provide with assurances that we think will address the risks that these detainees pose once they're transferred to the custody of the foreign government.

And that's because there are very dangerous people at Guantanamo. Enemy combatants at Guantanamo include not only rank-and-file jihadists who took up arms against the United States, but also senior al Qaeda operatives and leaders and Taliban leaders.

For example, enemy combatants captured during the course of hostilities include terrorists linked to most major al Qaeda attacks, including the East Africa embassy bombings and the USS Cole attack; terrorists who taught or received training on arms and explosives, surveillance and

interrogation resistance techniques at al Qaeda camps in Afghanistan and elsewhere; terrorists who continue to express their commitment to kill Americans and conduct suicide attacks if released; terrorists who have sworn personal allegiance to Osama bin Laden; terrorists linked to several al Qaeda operational plans, including possible targeting of specific facilities in the United States.

For example, we have an individual in Guantanamo with links to a financier of the 9/11 plot, who attempted to enter the United States through Orlando, Florida, in August 2001. Phone records suggest that 9/11 hijacker Mohamed Atta was also at the Orlando airport that day. This individual was later captured in Pakistan after fleeing Tora Bora.

There are two individuals associated with senior al Qaeda members who were working on remotely detonated explosive devices for use against U.S. forces in Afghanistan.

There's a member of an al Qaeda-supported terrorist cell in Afghanistan that targeted civilians, especially journalists and foreign aid workers, and who is responsible for a grenade attack on a foreign journalist's automobile.

There's an al Qaeda member who was plotting to attack oil tankers in the Persian Gulf using explosive-laden fishing boats.

There's an individual who fought with an al Qaeda-supported terrorist cell in Afghanistan, personally establishing reconnaissance and ambush positions around the Kandahar air base.

There's an individual who served as a bodyguard for Osama bin Laden and escorted him to Tora Bora, Afghanistan, following the fall of Jalalabad.

There's an al Qaeda member who served as explosives trainer for al Qaeda and designed a prototype shoe bomb for destroying airplanes and a magnetic mine for attacking ships.

There's an individual who trained al Qaeda associates in the use of explosives and worked on a plot to use cell phones to detonate bombs.

And there's an individual who served as an al Qaeda translator and managed operating funds for al Qaeda and who helped stockpile weapons for use against U.S. forces in Afghanistan.

These examples are merely illustrative, they're not comprehensive. But they demonstrate the importance in maintaining the security of the United States by holding dangerous enemy combatants off the battlefield.

Now, the intelligence -- I would like to talk a little bit about the intelligence that we're gaining from these individuals because that's a substantial part of the mission at Guantanamo. And perhaps General Miller could address that a little bit later. But these individuals are providing us important information, which General Miller likes to refer to as "the golden threads of intelligence" that help us understand the al Qaeda network and to help us defend ourselves against them.

Now, I mentioned there are three basic ways in which the enemy combatants are categorized down there: those who will potentially be eligible for release, those who will be eligible for transfer to their foreign governments, and those who will remain in continued detention.

As you may know, for those who will remain in continued detention, the Secretary announced some additional procedures that we are going to implement, and that is an Administrative Review Panel. And this will be a panel that will meet annually -- it will meet more than annually. It will review each detainee's case annually to determine whether that detainee continues to pose a threat to the United States. The detainee will have the opportunity to appear in person before that panel. The detainee's foreign government will have the opportunity to submit information on the detainee's behalf. And the panel will consider all of

the information, including intelligence information gained on the detainee and the information presented by the detainee and his government, and to make an independent recommendation about whether the detainee should be held.

And with that, I think we'll take any questions that you might have.

Q: Will a detainee have the right to have a lawyer when he appears before the review panel? And also, if people being held in Guantanamo pose such a threat, why not bring them to a speedy trial on charges and give them lawyers?

Butler: Well, it's important to remember that military commissions are not the reason that people are being held at Guantanamo. As I stated, under the laws of war, we have a right to hold enemy combatants who represent a threat to the United States and its forces off the battlefield. Military commissions are designed to punish those who have committed war crimes during the course of a war. And we have a process -- there has been an appointing authority appointed. And I won't speak to the military commissions in too much detail, but that process will take its own course.

What we're doing is we're reviewing people to determine whether they're still a threat. And if they are determined to be a threat, then we will continue to hold them until such time that they're not a threat anymore.

Q: How about lawyers when they appear before the review panel?

Butler: The details of that haven't been worked out. There will be someone available to help the detainee understand what the process and procedures are, what the board is, but it's unclear yet what, exactly, the details of the panel will be.

Q: But as of right now, you haven't decided that this person is entitled to a lawyer when he comes before the review panel.

Butler: That's correct.

Q: Do you know when the first of these boards would meet, approximately?

Butler: Not yet. I'm not prepared to talk about that now. But it's under active review.

Q: But I mean within the next year, within the next six months?

Butler: I just can't answer that question right now. I don't know.

Q: Could you say a little bit more about the makeup of the panel, who it is going to involve, who makes the appointments? Is this something that's going to be entirely within the Department of Defense or within the administration, or will there be any kind of independent elements in this?

Butler: Again, that's all under active consideration now and I don't have any further information on the composition of the panel, who will appoint it and who will be on it.

Q: Can you say whether the panel's decision will be final, or is it subject to review in other places in the administration?

Butler: Well, the panel will make a recommendation.

Q: To whom?

Butler: That's still under consideration, but most likely to the Secretary.

Q: And so this decision is not final.

Butler: Again, the details of the panel have not yet been worked out.

Q: Could you just step back a minute and help us understand why you're here today, why the Secretary's making this speech, why, suddenly out of the clear, blue sky, so much information today about what you're doing, but yet not final information about the panel? You put it out there and you're telling us, but you're clearly undecided on any number of things. Why are you telling everybody all of this today?

Butler: Well, there's been a lot of interest in what we're doing at Guantanamo, and there have been some events in the recent past, including the transfer of the one detainee to Spain, and so we thought it was an appropriate time to share some of the information about the vigorous procedures down here that we're using at Guantanamo.

There is an elaborate process. Detainees are not in a legal black hole. There is an enormous amount of time spent scrutinizing each individual case through various agencies of the government to help us determine who these people are. We are not interested in holding anyone for one more day than we have to. We want to evaluate them. If we can reach the conclusion that they're no longer a threat, we will release them. If we believe that we can reach transfer agreements with foreign governments who will take responsibility for them so that they're no longer a threat to us or to their populations, we want to do that. So we are -- we have sensed the interest in Guantanamo and we are responding to make sure that everybody is clear on what our policies are.

Q: Do you have any information that indicates anyone released from Guantanamo Bay and returned to wherever they came from has actually returned to the battlefield, so to speak, and has again joined the war on terrorism?

Butler: That's a -- it's a very important concern. I'm not going to go any further than that. I don't want to get into areas that involve intelligence. Needless to say -- I mentioned the Manchester Manual. When you have people that were picked up in a chaotic war, who are often trained on how to resist interrogations, who you don't have always tremendous amounts of information on before they come into your custody, you are always concerned that -- you make sure that you have full information on them before they're released.

Q: Is the establishment of this panel part of a concerted effort by the U.S. military to get these detainees into the hands of foreign governments; get them out of U.S. hands

and limit the numbers that are being detained at Guantanamo Bay?

Butler: No, I don't think so. The panel is designed to ensure that there is continued process that addresses the concerns that we all share that nobody be there any longer than they have to be. And if through our present procedures, the elaborate procedures that I just talked about, the detainee has not been released, these are additional procedures to make sure that -- the war -- the end of this war, of course -- I think the secretary has alluded to this is uncertain. And one thing we can say is it's not over now, but over time we want to make sure that, even perhaps if the war ends in stages, that there's constant review of these detainees to make sure that nobody's there any longer than they have to be.

Q: Is that an acknowledgement --

Whitman: We've got time for about one or two more. And it's not often we get General Miller here, so if you have one for General Miller it might be a good time to ask him.

Q: Could I just follow with one question? Is that an acknowledgement by the Pentagon that the processes so far established -- established to date, are not adequate to address those concerns of people being held too long?

Butler: Not at all. We have a certain set of processes, and as I think I mentioned to you, they're very vigorous, very elaborate. People spend enormous amounts of time scrutinizing each one of these detainees. This is just an additional procedure to once again ensure that we want to do the right thing here. We want to make sure we're holding people who are a threat and releasing people who we think no longer pose a threat.

Q: A number of these folks have been in custody two years or more now. Do they lose their intelligence value? Certainly, my two-year-old knowledge on things is dated. I mean, what kind of insight can you get on al Qaeda and their operatives?

Butler: Thank you -- sir?

Miller: There are -- they've had enemy combatants here at JTF Guantanamo -- some for almost two years, some for as little as two months. And so as we go about determining their intelligence value and their threat, we go through this very thorough process. There are three types of intelligence: technical intelligence -- that what the enemy combatant was doing when he was captured, if he had a weapon; and then there is operational and strategic intelligence, that allows us to better understand how terrorists are recruited, how terrorism is sustained, how the financial networks power terrorism. And so we developed this intelligence and are continuing to develop this intelligence. We continue to get extraordinarily valuable intelligence from the detainees who are at Guantanamo.

Q: So there is an acknowledgment that if these folks have served their useful time, you're trying to figure out a way to get rid of them?

Miller: It's my responsibility to make an assessment and recommendation on the detainee's intelligence value and their risk. We do that every day and that process is ongoing. Some are getting very close for us to make a recommendation; others, who are enormously dangerous and have enormous -- intelligence of enormous value, are still in this process.

Q: General, is there construction under way for a more permanent facility to house the more hard-core detainees once we seek an eventual release of the detainees?

Miller: There is another camp facility that's under construction. It is our interrogation facility which will replace the temporary facilities that we've been using for the last year and one half.

Q: How much of a number of detainees will that facility house? And --

Miller: That facility -- I'm sorry. That facility --

Q: And why the construction?

Miller: That facility can house up to 100 enemy combatants who we will conduct interrogation upon. And to be frank with you, we're replacing interrogation facilities that were trailers with better facilities that allow us to more effectively and rapidly do this job of interrogation.

Q: Is it a housing facility then or is it more strictly just for interrogation?

Miller: It is a interrogation facility. But we can house an enemy combatant there to accelerate and help us in the interrogation process.

Q: Mr. Butler, why aren't some of the al Qaeda people you described being charged criminally? Because previously the U.S. government has prosecuted al Qaeda operatives, like the guy you mentioned who was at the U.S. airport shortly before 9/11?

Butler: All of these detainees were captured in the context of the global war on terrorism. They are enemy combatants in the war. There is a decision process in place, an independent appointing authority, who will eventually make decisions on who should be charged for war crimes.

But the great insight of the president, and the secretary, and others in the administration, I think, after 9/11, was that we are at war now, and that the criminal justice model, although very important to fighting the war on terrorism, is not the sole tools right now, and therefore, enemy combatants are being held for security reasons. And again, the appointing authority will decide who is charged.

Whitman: We'll take one last one, if we could. Somebody that hasn't had one.

Q: Can you tell us about what Camp Echo is, how it differs from the existing Camp Delta facility? And in connection to that, how much is the overall operation costing?

Miller: Camp Echo is our facility where we hold the pre-commissions detainees. Once the president has decided to move forward in this process, we separate these enemy combatants from the general population and move them into Camp Echo, in that facility, to allow us to separate them, plus, to allow their lawyers, when they're appointed, to have access to the enemy combatants to hold private conversations.

Q: (Off mike.) -- just like Camp Delta but separate? Or is it a different layout? Well, it sounded almost like it might be a suite; there's a room for lawyers, I read somewhere. What does it look like?

Miller: There are individual buildings, so the enemy combatant is in his own cell with an area where the lawyer may come in and have a private discussion with him.

Whitman: All right, thank you very much, ladies and gentlemen.

Q: And the second part was how much is it costing?

Whitman: Who did he ask? I guess the assistant secretary?

Butler: I'm sorry, I don't have that information.

Miller: We don't normally discuss the operational costs of the JTF. It's an ongoing operational unit.

Q: Thank you.

Miller: But I will tell you we're a great buy!

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

12 Feb 04

MEMORANDUM FOR THE APPOINTING AUTHORITY

FROM: Detailed Defense Counsel

TO: Appointing Authority

THRU: Prosecution in the case of U.S. v. Hamdan

SUBJ: UNITED STATES v. HAMDAN

1. On 15 December 2003 the defense received from the Chief Prosecutor a letter requesting the Chief Defense Counsel detail defense counsel in the subject case to begin preparations for trial. Pursuant to this letter a deadline of 9 January 2004 was imposed in when the defense was to respond to the prosecutor concerning Mr. Hamdan's willingness to enter into a pretrial agreement.

2. Following notification from the defense on 9 January 2004, that the defense had been unable to meet with Mr. Hamdan due to the absence of qualified interpreter, the original deadline was rescinded and a second deadline of 12 February 2004 was imposed.

3. The defense met with Mr. Hamdan on 30 January through 1 February 2004, and again on 7 through 9 February 2004. After extensive consultation, Mr. Hamdan is unwilling to enter into pretrial negotiations until such time as he is lawfully charged before a Military Commission.

4. As a consequence of his pending trial, Mr. Hamdan has moved out of detention in Camp Delta with his fellow detainees into Camp Echo, where he is being held in what is deemed by Joint Task Force Guantanamo as "pre-commission segregation." Pre-commission segregation has materially altered the conditions of Mr. Hamdan's confinement. He is held in what amounts to solitary

confinement, is unable to exercise in daylight and has no contact with any other detainee. Consequently the defense considers that based on the conditions of Mr. Hamdan's confinement, and the legal actions to date, Mr. Hamdan is being held in pretrial confinement rather than war time detention.

5. Mr. Hamdan, pursuant to Article 10 of the Uniform Code of Military Justice (UCMJ) Mr. Hamdan demands to be informed of the specific charges against him or to be released from pre-commission segregation into general detention. Article 10, UCMJ holds "when any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." Military order of 15 November 2001 relies in part on UCMJ Articles 21 and 36. Article 36 allows the President to prescribe rules for military courts-martial and military commissions, so far as they are not inconsistent with "this chapter" (Uniform Code of Military Justice), consequently Article 10 as a general provision of the Uniform Code of Military Justice is applicable to military commissions and the protections granted there-under should be afforded to a detainee in pre-commission segregation.

/s/
C.D. SWIFT
LCDR, JAGC, U.S. NAVY
Detailed Defense Counsel

CC:
CDC

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

February 23, 2004

MEMORANDUM FOR Lieutenant Commander C.D. Swift, USN, Detailed Defense Counsel for Salem Ahmed Hamdan

SUBJECT: In the Case of Salem Ahmed Hamdan: Question Regarding the Application of Article 10, UCMJ

I am in receipt of your February 12, 2004 memorandum requesting a determination that Article 10, UCMJ, applies to the Department of Defense detention of Salem Ahmed Hamdan. The Department of Defense is detaining Mr. Hamdan as an unlawful enemy combatant. Article 10, UCMJ, does not apply to Mr. Hamdan's detention.

/s/
Thomas L. Hemingway
Brig Gen, USAF
Legal Advisor to the Appointing Authority
Office of Military Commissions

cc: Chief Defense Counsel

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

18 December 2003

MEMORANDUM DETAILING DEFENSE COUNSEL

TO: LCDR Charles Swift, USN
SUBJECT: Detailing Letter re Military Commission Proceedings of Mr. Salem Ahmed Salem Hamden

Pursuant to the authority granted to me by my appointment as Acting Chief Defense Counsel and Sections 4C and 5D of Military Order No. 1, dated March 21, 2002, you are hereby detailed as Military Counsel for all matters relating to Military Commission proceedings involving Mr. Salem Ahmed Salem Hamden. Your appointment exists until such time any findings and sentence become final as defined in Section 6(H)(2) unless you are excused from representing Mr. Hamden by me or my successor. I deem your detailing to be appropriate based on the government's assertion in enclosure (1) that on July 3, 2003, the President determined that Mr. Hamden is subject to the Military Order of November 13, 2001 and as such "shall when tried, be tried by military commission for any and all offenses triable by military commission that [he] is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

In your representation of Mr. Hamden, you are directed to review and comply with Presidential Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (66 FR 57833); Military Commission Orders No. 1 and 2 and Military Commission Instructions 1 through 8 and all Supplementary Regulations and Instructions issued in accordance therewith. Specifically, you are directed to ensure

that your conduct and activities are consistent with the prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Appendix B to Military Instruction No. 5.

You are directed to inform Mr. Hamden of his rights before a Military Commission. In the event that Mr. Hamden chooses to exercise his rights to Selected Military Counsel or his right to Civilian Defense Counsel at his own expense, you shall inform me as soon as possible. Consistent with paragraph 3B(8) of Military Instruction No. 4, I am detailing Legalman First Class Jason E. Kreinhop as a member of the defense team to assist you in representing Mr. Hamden.

In the event that you become aware of a conflict of interest arising from the representation of Mr. Hamden before a Military Commission, you shall immediately inform me of the nature and facts concerning such conflict. You should be aware that in addition to your State Bar and Service Rules of Professional Conduct that by virtue of your appointment to the Office of Military Commissions you will be attached to the Defense Legal Services Agency and will be subject to professional supervision by Department of Defense General Counsel.

You are directed to inform me of all requirements for personnel, office space, equipment, and supplies necessary for preparation of the defense of Mr. Hamden.

/s/
Colonel Will A. Gunn, USAF
Chief Defense Counsel (Acting)
Office of Military Commissions

Enclosure:
Target Letter re Mr. David Hamden dated December 15, 2003

cc:
LNl Kreinhop
Col Borch
General Hemingway
Mr. Koffsky

I, Salim Ahmed Hamdan, request that Lieutenant Commander Charles Swift serve as my "next friend" to authorize the filing of habeas and mandamus petitions on my behalf in the United States District Court for the Western District of Washington State. Lt. Commander Swift has been detailed to serve as my military counsel by the Department of Defense. I am inaccessible because I am detained at Guantanamo Bay, Cuba and I have no family presently in the United States. I understand that Professor Neal Katyal of Georgetown University Law Center will bring the legal action on behalf of Charles Swift.

/s/

SALIM AHMED HAMDAN DATE

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

December 15, 2003

MEMORANDUM FOR ACTING CHIEF DEFENSE COUNSEL

SUBJECT: Target Letter re Military Commission Investigation of Mr. Salem Ahmed Salem Hamdan

On July 3, 2003, the President determined that Mr. Salem Ahmed Salem Hamdan is subject to the Military Order of November 13, 2001. As a result, pursuant to Section 4(a) of the President's Military Order, Mr. Hamdan "shall, when tried, be tried by military commission for any and all offenses triable by military commission that [he] is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

The Office of the Chief Prosecutor is considering whether to prepare charges against Mr. Hamdan and present them to the Appointing Authority for approval and referral in accordance with Section 4(B)(2) of Military Commission Order No. 1, dated March 21, 2002. The charges currently under consideration include, but are not limited to: attacking civilians and civilian objects; terrorism; and conspiracy to commit the above mentioned offenses. Theories of liability in proving these offenses may include conspirator liability for the substantive offense, liability based upon being a member of an enterprise of persons who shared a common criminal purpose, aider and abettor liability, or some combination thereof.

Under my interpretation of Section 3(B)(8) of Military Commission Instruction No. 4, you are authorized to detail a military defense counsel to advise Mr. Hamdan on how he might engage in pretrial discussions with a view toward

resolving the allegations against him. My office will make the arrangements with the Commander, Joint Task Force Guantanamo, for such detailed military defense counsel to have access to Mr. Hamdan. Such access shall continue so long as we are engaged in pretrial negotiations. Please advise me as soon as possible what arrangements, if any, you desire to facilitate this representation.

Attachment 1 to this memorandum is provided: 1) to assist Mr. Hamdan's detailed defense counsel in evaluating the potential charges against him; and 2) to advise Mr. Hamdan regarding his options. Additional discovery will be provided to detailed defense counsel when identified.

The final decisions regarding charges against Mr. Hamdan and the terms of any plea agreement that might be entered are within the sole discretion of the Appointing Authority. Nothing in this memorandum, or in any subsequent discussions between the Office of the Chief Prosecutor and the defense counsel detailed to represent Mr. Hamdan pursuant to this memorandum, should be considered as binding on the Appointing Authority.

Please advise the Office of the Chief Prosecutor no later than January 9, 2004 whether or not Mr. Hamdan is interested in discussing a plea agreement.

Commander Scott Lang is my point of contact for matters related to this memorandum.

Disclosure or other public release of the contents of this memorandum is prohibited by Military Commission

Instruction No. 4, Section 3(B)(4) and Military Commission Instruction No. 5, Annex B, Section II(E)(1).

/s/
Frederic L. Borch
Colonel, U.S. Army
Chief Prosecutor (Acting)
Office of Military Commissions

Attachment:

1. Salem Ahmed Salem Hamdan FBI 302, dated July 10, 2002

Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

***Army Regulation 190-8**
***OPNAVINST 3461.6**
***AFJI 31-304**
***MCO 3461.1**

Effective 1 November 1997

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

Chapter 1
Introduction

1-1. Purpose

a. This regulation provides policy, procedures, and responsibilities for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces. This regulation also establishes procedures for transfer of custody from the United States to another detaining power.

b. This regulation implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are:

(1) The 1949 Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS).

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* This regulation supersedes AR 190-8, 1 June 1982, and rescinds AR 190-57, 4 March 1987. This regulation also rescinds DA Form 5451-R, August 1985; DA Form 5452-R, August 1985; and DA Form 5976, January 1991.

(2) The 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GWS SEA).

(3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW).

(4) The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), and In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.

* * *

1-5. General protection policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder,

torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence.

d. Photographing, filming, and video taping of individual EPW, CI and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command.

e. A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP) to monitor whether protected persons are receiving humane treatment as required by the Geneva Conventions. The text of the Geneva Convention, its annexes, and any special agreements, will be posted in each camp in the language of the EPW, CI and RP.

f. Medical Personnel. Retained medical personnel shall receive as a minimum the benefits and protection given to EPW and shall also be granted all facilities necessary to provide for the medical care of EPW. They shall continue to exercise their medical functions for the benefit of EPW, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the United States Armed Forces. They shall be provided with necessary transport and allowed to periodically visit EPW situated in working detachments or in hospitals outside the EPW camp. Although subject to the internal

discipline of the camp in which they are retained such personnel may not be compelled to carry out any work other than that concerned with their medical duties. The senior medical officer shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel.

g. Religion.

(1) EPW, and RP will enjoy latitude in the exercise of their religious practices, including attendance at the service of their faith, on condition that they comply with the disciplinary routine pre-scribed by the military authorities. Adequate space will be provided where religious services may be held.

(2) Military chaplains who fall into the hands of the U.S. and who remain or are retained to assist EPW, and RP, will be allowed to minister to EPW, RP, of the same religion. Chaplains will be allocated among various camps and labor detachments containing EPW, RP, belonging to the same forces, speaking the same language, or practicing the same religion. They will enjoy the necessary facilities, including the means of transport provided in the Geneva Convention, for visiting the EPW, RP, outside their camp. They will be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Chaplains shall not be compelled to carry out any work other than their religious duties.

(3) Enemy Prisoners of War, who are ministers of religion, with-out having officiated as chaplains to their own forces, will be at liberty, whatever their denomination, to minister freely to the members of their faith in U.S. custody. For this purpose, they will receive the same treatment as the chaplains retained by the United States. They are not to be obligated to do any additional work.

(4) If EPW, RP, do not have the assistance of a chaplain or a minister of their faith. A minister belonging to the

prisoner's de-nomination, or in a minister's absence, a qualified layman, will be appointed, at the request of the prisoners, to fill this office. This appointment, subject to approval of the camp commander, will take place with agreement from the religious community of prisoners concerned and, wherever necessary, with approval of the local religious authorities of the same faith. The appointed person will comply with all regulations established by the United States.

1-6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

e. Procedures.

(1) Members of the Tribunal and the recorder shall be sworn. The recorder shall be sworn first by the President of

the Tribunal. The recorder will then administer the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

(4) Persons whose status is to be determined shall be advised of their rights at the beginning of their hearings.

(5) Persons whose status is to be determined shall be allowed to attend all open sessions and will be provided with an interpreter if necessary.

(6) Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.

(7) Persons whose status is to be determined have a right to testify or otherwise address the Tribunal.

(8) Persons whose status is to be determined may not be compelled to testify before the Tribunal.

(9) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination.

(10) A written report of the tribunal decision is completed in each case. Possible board determinations are:

(a) EPW.

(b) Recommended RP, entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

(c) Innocent civilian who should be immediately returned to his home or released.

(d) Civilian Internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.

f .The recorder shall prepare the record of the Tribunal within three work days of the announcement of the tribunal's decision. The record will then be forwarded to the first Staff Judge Advocate in the internment facility's chain of command.

g. Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

1-7. The National Prisoner of War Information Center (NPWIC)

The NPWIC Will-

a. Forward blocks of ISNs to designated Branch PWIC in Theater and CONUS, as required.

b. Obtain and store information concerning EPW, CI and RP, and their confiscated personal property. Information will be collected and stored on each EPW, CI, and RP captured and detained by U.S. Armed Forces. This includes those EPW, RP, who were captured by the United States but are in custody of other powers and those who have been released or repatriated. EPW, CI and RP cannot be forced to reveal any information however they are required to provide their name, rank, serial number and date of birth. The Geneva Convention requires the NPWIC to collect and store the following information for EPW, RP:

(1) Complete name.

(2) ISN.

(3) Rank.

(4) Serial number.

(5) Date of birth.

(6) City of birth.

(7) Country of birth.

(8) Name and address of next of kin.

(9) Date of capture.

(10) Place of capture.

(11) Capturing unit.

(12) Circumstances of capture.

(13) Location of confiscated personal property.

(14) Nationality.

(15) General statement of health.

(16) Nation in whose armed services the individual is serving.

(17) Name and address of a person to be notified of the individual's capture.

(18) Address to which correspondence may be sent.

(19) Certificates of death or duly authenticated lists of the dead.

(20) Information showing the exact location of war graves together with particulars of the dead.

(21) Notification of capture.

(22) List of personal articles of value not restored upon repatriation.

c. Obtain and store information concerning CI and ODs who are kept in the custody of U.S. Armed Forces who are subjected to assigned residence, or who were interned and then released. The following information will be collected:

(1) Any particulars that may assist in the individual's identification. This information shall include at least the

person's surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent and the name and address of the person to be informed.

(2) The individual's personal data for notification of his or her internment, state of health, and changes to this data.

(3) Certificates of death or authenticated lists of the dead and information showing the location of graves.

(4) Authenticated lists of personal valuables left by these protected persons.

(5) Information pertaining to children living in territories occupied by the United States. This will include all data necessary for identifying children whose identity is in doubt.

d. Process all inquiries concerning EPW and RP captured by U.S. Armed Forces.

e. Make reports to the ICRC, the State Department, and other Federal agencies as required.

f. Provide to the adverse party via the ICRC's Central Tracing Agency (CTA) all pertinent information pertaining to EPW, CI, and RP, in custody of the U.S. Aimed Forces.

g. Transmit via the CTA/ICRC/PP, all official documents and information on judicial proceedings concerning EPW and RP captured, interned, retained or detained by U.S. Armed Forces.

h. Information and Property Transfers.

(1) In response to an inquiry, the NPWIC will forward all information and documents to the CTA or PP.

(2) Valuables and personal property which can be returned to a released or repatriated person will be forwarded through the CTA or PP.

(3) Valuables and personal property of deceased EPW/RP, which can be released, will be forwarded to the next of kin through the CTA or PP.

i. The ICRC/PP transmits information, documents, and personal effects to the State it represents as follows:

(1) If civilians are concerned, to their countries of origin and/or residence.

(2) If combatants or EPW, CI, and RP are concerned, to their country of origin or to the Power on which they depend.

1-8. The Branch PWIC

a. The Branch PWIC functions as the field operations agency for the NPWIC. It is the central agency responsible to maintain information on all EPW, CI and RP and their personal property within an assigned theater of operations or in CONUS.

b. The Branch PWIC serves as the theater repository for information pertaining to:

(1) Accountability of EPW, CI, and RP and implementation of DOD policy.

* * *

3-7. Punitive Jurisdiction

a. EPW/RP are subject to punishment under the Uniform Code of Military Justice and other U.S. Laws, regulations and orders in force during the time of their detention.

b. Judicial proceedings against EPW and RP will be by courts-martial or by civil courts. When EPW are tried by courts-martial, pretrial, trial, and post-trial procedures will be according to the UCMJ and the U.S. Manual for Courts-Martial. An EPW will not be tried by a civil court for committing an offense unless a member of the U.S. Armed Forces would be so tried.

c. When possible, disciplinary rather than judicial measures will be taken for an offense. The disciplinary measures below are authorized:

(1) Suspend or eliminate privileges granted over and above the minimum privileges provided for in the GPW and GC.

(2) Confinement.

(3) A fine not to exceed one-half of the advance of pay (article 60 GPW) and working pay (article 62 GPW) that the detainee would otherwise receive during a period of not more than 30 days.

(4) Fatigue duties not exceeding 2 hours daily. This punishment will not be applied to officers.

d. EPW and RP rights. Before any disciplinary punishment is pronounced, EPW/RP will be given precise information regarding the offenses for which they are accused. They will be given a chance to explain their conduct and to defend themselves. They will be permitted to call witnesses and to have use of a qualified interpreter, if necessary and reasonably available. The board's decision will be announced to the person and to the person's representative.

e. The following are limitations on punishment:

(1) Collective punishment for individual acts, corporal punishment, imprisonment in premises without sunlight, and any form of torture or cruelty is forbidden.

(2) EPW may not be deprived of their grade or prevented from wearing insignia of grade and nationality.

(3) No EPW or RP will be handcuffed or tied, except to ensure safe custody or when prescribed by a responsible medical officer as needed to control a medical case requiring restraint.

(4) No EPW or RP may be punished more than once for the same act or sentenced to any penalties except those authorized herein.

(5) In no case will disciplinary punishments be inhumane, brutal, or dangerous to the person's health. The length of a single disciplinary punishment will not exceed 30 days. Confinement served while awaiting the hearing of a

disciplinary offense or the award of disciplinary punishment will be deducted from punishment awarded. No more than 30 days punishment may be prescribed even if a person is answerable for several acts at the same time. This is true whether such acts are related or not. The period between pronouncing an award of disciplinary punishment and commencing punishment will not exceed 30 days.

(6) When EPW or RP are awarded a further disciplinary punishment, a period of at least 3 days will elapse between punishments if the length of one of the punishments is 10 days or more.

(7) EPW or RP being disciplined or judicially punished will not be subjected to more severe treatment than that authorized for the same offense by members of the U.S. Armed Forces of equal grade.

(8) EPW or RP sentenced by a courts-martial or awarded disciplinary punishment will not be treated differently from other detainees after their punishment.

f. Offenses and warranted punishments. EPW or RP who attempt to escape or escape the confines of the camp, but who do not succeed in their escape, will be liable only to disciplinary punishments for those escape acts. They will not be liable to judicial proceedings, even if they are repeat offenders. Escapes or attempts to escape, even if they are repeat offenses, will not be considered aggravating circumstances if detainees are tried by judicial proceedings for offenses committed during their escapes or attempts to escape. Offenses, such as those against public property, theft with-out intention of self-enrichment, drawing up or use of false papers, or wearing of civilian clothing, that are committed by detainees with the sole intent of making their escape easier and that do not entail any violence against life or limb will warrant disciplinary punishment only. Because of attempts to escape, EPW and RP may be subjected to close watch. The watch must not affect the state of their health. The EPW and RP watched must be in camp. The watch must

not deprive them of the safeguards granted by the Geneva Conventions. Persons who aid or abet an escape or an attempt to escape will be liable on this count for disciplinary punishment only.

g. Offenses against discipline. EPW and RP accused of an offense against disciplinary measures will not be confined pending a hearing, unless members of the U.S. Armed Forces would be confined if they were accused of a similar offense or unless camp order and discipline would be jeopardized. A period spent in confinement awaiting disposal of an offense against disciplinary measures will be reduced to an absolute minimum. It will not exceed 14 days.

h. Confinement. A pretrial investigation of an offense alleged to have been committed by a detainee will be conducted as soon as circumstances permit so that trial, if warranted, will take place as soon as possible. A detainee will not be confined while awaiting trial unless a member of the U.S. Armed Forces would be so confined if accused of a similar offense, or unless national security would be served. In no case will this confinement exceed 3 months. A period spent in confinement while awaiting trial will be deducted from a sentence of imprisonment. The period will be taken into account in fixing a penalty.

i. Retention of Geneva Convention benefits. Persons prosecuted for an act committed before capture will retain, even if convicted, the protection of the Geneva Conventions. EPW, RP undergoing confinement will:

(1) Continue to enjoy the benefits of the Geneva Convention except when such benefits do not apply because detainees are confined.

(2) Be permitted to exercise their right to complain and to confer with visiting representatives of the Protecting Power.

(3) Not be deprived of the prerogatives attached to their grade.

(4) Be allowed to exercise and to stay in the open air at least 2 hours daily.

(5) Be given medical attention as prescribed in this regulation.

(6) Be permitted to read and write and to send and receive letters and cards. Parcels, however, may be withheld from them until the punishment is completed. Such parcels will be released to the safe-keeping of the detainee representative. If perishable goods are contained in the parcels, the detainee representative will give them to the camp infirmary or hospital to distribute them fairly among the other detainees.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, a resident of the State of Washington, as next friend for SALIM AHMED HAMDAN,

Military Commission Detainee, Camp Echo, Guantanamo Bay Naval Base, Guantanamo Bay, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States,

Respondents.

NO. CV04-0777L

DECLARATION OF DARYL MATTHEWS, M.D., Ph.D.

DECLARATION OF DARYL MATTHEWS, M.D., Ph.D.

DARYL MATTHEWS, M.D., Ph.D., hereby declares and states as follows:

1. I am over the age of eighteen (18) years. The following is true and correct to the best of my knowledge. I have personal knowledge of the matters stated herein and, if called upon to testify, could competently testify thereto.

2. My qualifications to render expert psychiatric opinions include my education and training and my professional experience, set forth in detail in my curriculum vitae, which is attached as Exhibit A.

3. I received my M.D. degree in 1973 from the Johns Hopkins University School of Medicine. My postgraduate medical education included a residency in psychiatry at Johns Hopkins Hospital from 1973 to 1976 and a fellowship in forensic psychiatry at the University of Virginia Schools of Law and Medicine. I am board certified in psychiatry and forensic psychiatry by the American Board of Psychiatry and Neurology, serve as an Examiner for that Board, and as a member of the Board's Forensic Psychiatry Examination Committee.

4. I have held faculty positions in medicine and public health at the Johns Hopkins University, Boston University, The University of Virginia, and the University of Arkansas, and am currently Professor of Psychiatry and Director of the Forensic Psychiatry Program at the John A. Burns School of Medicine at the University of Hawaii.

5. I have conducted psychiatric evaluations of more than 1,000 patients or forensic examinees, hundreds of them within the confines of jails, prisons, and similar facilities. These have included scores of facilities in 12 states, of all security levels, operated by local, state, civilian federal, and military authorities.

6. My evaluations and expert opinions have been admitted into evidence in more than 500 legal proceedings, including commitment hearings, civil trials, and criminal trials. I have been admitted to testify as an expert at trial by state and federal courts and military courts-martial in 20 states.

7. My sources of information in this matter are:

(a) Affidavit of Mr. Salem Ahmed Salem Hamdan, (translated by Mr. Charles Schmitz), of February 9, 2004, and

(b) Representations made to me by Mr. Hamdan's attorney, LCDR Charles Swift.

8. According to his affidavit and his attorney, Mr. Hamdan is approximately 34 year-old married Yemini male, father of two children ages 4 and 2, who is currently confined at the U.S. Naval Base, Guantanamo Cuba.

9. Since December 2003 Mr. Hamdan has been confined alone in a cell, in a house that is guarded by a single non-Arabic-speaking guard. A translator is rarely available. He receives 60 minutes of exercise outdoors three times a week, only at night.

10. Mr. Hamdan has met his attorney, but he has not been charged with any offense. He has been told that he is facing trial before a military commission, but does not know when this is to occur. He understands that, even if acquitted, he potentially faces indefinite confinement at the discretion of the U.S. government.

11. Mr. Hamdan has described his moods during his period of solitary confinement as deteriorating, and as encompassing frustration, rage (although he has not been violent), loneliness, despair, depression, anxiety, and emotional outbursts. He asserted that he has considered confessing falsely to ameliorate his situation. LCDR Swift has described Mr. Hamdan's condition to me, as observed during their meetings, as initially agitated and withdrawn,

with a brightening mood as the visit proceeds, but ending with Mr. Hamdan begging him not to leave.

12. Mr. Hamdan's past history includes the death of both parents before he was 12 years old, followed by periods of non-supervision and homelessness.

13. The medical literature has described the harmful mental effects of solitary confinement at least since 1854; the recent literature confirms their presence. Adverse effects include hypersensitivity to external stimuli, hallucinations, perceptual distortions, derealization experiences, depression, anxiety, mood liability, difficulties in concentration and memory, paranoid thinking, and problems with impulse control. The extent of these appears to vary with the length of solitary confinement and the degree of isolation experienced. There is evidence that some prisoners suffer long term psychological damage as a result of such confinement.

14. It is my opinion, to a reasonable medical certainty, that Mr. Hamdan's current conditions of confinement place him at significant risk for future psychiatric deterioration, possibly including the development of irreversible psychiatric symptoms. Additionally the conditions of his confinement make Mr. Hamdan particularly susceptible to mental coercion and false confession in conjunction with his case.

15. The conditions of confinement described by Mr. Hamdan and his legal counsel may also cause deterioration to the point of significant impairment of his ability to assess his legal situation and assist defense counsel. His array of pre-isolation stressors place him at particularly high risk, as does the psychological stress of the uncertainty he faces over his lack of charges and about the nature and duration of his future confinement.

16. It is my medical opinion that a release from solitary confinement and a return to the general population combined with a definite advisement as to potential charges and proceedings would significantly mitigate the risk of mental impairment/coercion in Mr. Hamdan's case.

17. These opinions were reached without my conducting a personal examination of Mr. Hamdan due to government restrictions preventing access to Mr. Hamdan for all but cleared persons.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 31 day of March, 2004.

/s/
Daryl Matthews, M.D., Ph.D.

State of Illinois
County of Cook

Signed and sworn (or affirmed) to before me on March 31, 2004 by /s/ [Daryl Matthews]

/s/ [Martha A. Ortiz]
Signature of Notary Public

Judge Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, as next friend for SALIM AHMED HAMDAN, Military Commission Detainee, Camp Echo, Guantanamo Bay Naval Base, Guantanamo Bay, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States,

Respondents.

NO. CV04-0777RSL

NOTICE OF MOTION AND RESPONDENTS' CROSS-MOTION TO DISMISS, CONSOLIDATED RETURN TO PETITION AND MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION TO DISMISS

(Note on Motion Calendar for September 3, 2004)

Respondents respectfully request, pursuant to Rule 12(b)(1) and (b)(6), of the Federal Rules of Civil Procedure,

that this Court deny the petition for writ of mandamus or, in the alternative, writ of habeas corpus ("petition"), grant respondents' cross-motion to dismiss, and enter a judgment of dismissal in favor of respondents. This cross-motion is made and based on the accompanying memorandum, the pleadings and papers filed herein, and such oral argument as the Court may entertain.

DATED this 6th day of August, 2004.

Respectfully submitted,

JOHN McKAY
United States Attorney

DAVID B. SALMONS
JONATHAN L. MARCUS
Assistants to the Solicitor General
Office of the Solicitor General
U.S. Department of Justice

s/ Brian C. Kipnis
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Attorneys for Respondents

EXHIBIT A

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN a/k/a Salim Ahmad Hamdan a/k/a Salem Ahmed Salem Hamdan a/k/a Saqr al Jadawy a/k/a Saqr al Jaddawi a/k/a Khalid bin Abdallah a/k/a Khalid wl'd Abdallah	**CHARGE:** **CONSPIRACY**

Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is a person subject to trial by Military Commission. At all times material to the charge:

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah, hereinafter "Hamdan") is subject to his Military Order of November 13, 2001.
2. Hamdan's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others around 1989 for the purpose of opposing certain governments and officials with force and violence.

4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans,*" in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.
9. In February of 1998, Usama bin Laden, Ayman al Zawahari and others under the banner of the "International Islamic Front for Jihad on the Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans - whether civilian or military - anywhere they can be found and to "plunder their money."
10. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it

is the duty of the Muslims to prepare as much force as possible to terrorize enemies of God."

11. Since 1989, members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

12. Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah, hereinafter "Hamdan"), in Afghanistan, Pakistan, Yemen and other countries, from on or about February 1996 to on or about November 24, 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Saif al Adel, Dr. Ayman al Zawahari (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

13. In furtherance of this enterprise and conspiracy, Hamdan and other members or associates of al Qaida committed the following overt acts:

    a. In 1996, Hamdan met with Usama bin Laden in Qandahar, Afghanistan and ultimately became a bodyguard and personal driver for Usama bin Laden. Hamdan served in this capacity until his capture in November of 2001. Based on his contact with

Usama bin Laden and members or associates of al Qaida during this period, Hamdan believed that Usama bin Laden and his associates were involved in the attacks on the U.S. Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001.

b. From 1996 through 2001, Hamdan:

1) delivered weapons, ammunition or other supplies to al Qaida members and associates;

2) picked up weapons at Taliban warehouses for al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida's security committee, in Qandahar, Afghanistan;

3) purchased or ensured that Toyota Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with protecting and providing physical security for Usama bin Laden; and

4) served as a driver for Usama bin Laden and other high ranking al Qaida members and associates. At the time of the al Qaida sponsored attacks on the U.S. Embassies in Tanzania and Kenya in August of 1998, and the attacks on the United States on September 11, 2001, Hamdan served as a driver in a convoy of three to nine vehicles in which Usama bin Laden and others were transported to various areas in Afghanistan. Such convoys were utilized to ensure the safety of Usama bin Laden and the others. Bodyguards in these convoys were armed with Kalishnikov rifles, rocket propelled grenades, hand-held radios and handguns.

c. On divers occasions between 1996 and November of 2001, Hamdan drove or accompanied Usama bin

Laden to various al Qaida-sponsored training camps, press conferences, or lectures. During these trips, Usama bin Laden would give speeches in which he would encourage others to conduct "martyr missions" (meaning an attack wherein one would kill himself as well as the targets of the attack) against the Americans, to engage in war against the Americans, and to drive the "infidels" out of the Arabian Peninsula.

d. Between 1996 and November of 2001, Hamdan, on divers occasions received training on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in Afghanistan.

EXHIBIT B

No. 040004

UNITED STATES v. SALIM AHMED HAMDAN a/k/a Salim Ahmad Hamdan a/k/a Salem Ahmed Salem Hamdan a/k/a Saqr al Jadawy a/k/a Saqr al Jaddawi a/k/a Khalid bin Abdallah a/k/a Khalid wl'd Abdallah	**Approval of Charge And Referral** July 13, 2004

The charge against Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr at Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is approved and referred to the Military Commission identified at Encl 1. The Presiding Officer will notify me not later than July 26, 2004, of the initial trial schedule, including dates for submission and argument of motions, and a convening date.

/s/
John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES SWIFT, as next friend for SALIM AHMED HAMDAN, Petitioner, v. DONALD H. RUMSFELD, *et al.*, Respondents.	Case No. C04-0777L **ORDER TRANSFERRING CASE TO DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

I. INTRODUCTION

This matter comes before the Court on a motion to dismiss or transfer (Dkt. # 34) filed by Respondents Donald H. Rumsfeld, et al. ("Respondents"). For the reasons set forth in this Order, the Court transfers this action to the United States District Court for the District of Columbia.

II. DISCUSSION

A. Background.

Petitioner Lieutenant Commander Charles Swift ("Petitioner"), as next friend for Salim Ahmed Hamdan ("Hamdan"), filed this petition for writ of mandamus or, alternatively, writ of habeas corpus, in this Court on April 6, 2004. Hamdan has been held at United States Naval Base at Guantanamo Bay, Cuba, since having been taken into custody by United States military forces in Afghanistan in November of 2001. In July of 2003 the President determined that there was reason to believe that Hamdan was an Al Qaeda member or otherwise involved in terrorism directed at the United States and therefore designated Hamdan for trial before a military commission. The Department of Defense then

appointed Petitioner to defend Hamdan before the military commission.

Petitioner challenges the military commission process, the conditions under which Hamdan is held, and Hamdan's detention on numerous grounds. See Petition at 15-23. Petitioner seeks an order compelling Respondents to release Hamdan from his current detention at Camp Echo to general detention at Camp Delta, enjoining Respondents from enforcing the military order pursuant to which Hamdan is detained, compelling Respondents to justify as lawful his continued detention, and, in the absence of adequate justification, ordering Hamdan's release. See id. at 24-25.

The Court ordered Respondents to file a return to Petitioner's petition by the earlier of thirty days after the Supreme Court's disposition of Rasul/Al Odah and Padilla or July 28, 2004, (Order Granting Motion to Hold Petition in Abeyance at 8.) Petitioner's reply was due two weeks after that deadline. The Court scheduled oral argument on the matter for September 8, 2004. On July 16, 2004, Respondents sought leave of the Court to file a motion regarding whether this matter should proceed in this Court. The Court granted Respondents leave to file that motion and modified the schedule for filing the return and reply.

Respondent's motion is presently before the Court.

B. Analysis.

Respondents argue that the Court must dismiss the action for lack of subject matter jurisdiction because Petitioner lacks standing as Hamdan's "next friend." See Motion at 3-8. Respondents further contend that even if dismissal is not warranted, the matter should be transferred to the United States District Court for the District of Columbia pursuant to Gherebi v. Bush, 2004 WL 1534166, ___ F.3d ___ (9th Cir. July 8, 2004) [Gherebi II]. See id. at 8-9. Petitioner argues that next friend status is proper because Hamdan lacks meaningful access to the Court and/or Petitioner has third party standing in this case. See Response

at 1-11. Petitioner further contends that transfer is not warranted because this is primarily a mandamus action and, pursuant to the Mandamus and Venue Act, Petitioner's residence in Washington State makes venue in this district proper. See id. at 11-24. Even if the Court determines that mandamus is unavailable here, Petitioner contends that Gherebi II does not require transfer of venue in this matter. See id. at 24-25.

1. Gherebi II.

On June 30, 2004, the United States Supreme Court vacated and remanded Gherebi v. Bush, 352 F.3d 1278 (2003) [Gherebi I], for reconsideration in light of Rumsfeld v. Padilla, 542 U.S. ___, 124 S. Ct. 2711(2004). Bush v. Gherebi, 124 S. Ct. 2932 (2004). Following remand, the Gherebi II Court held that the proper venue for the next-friend petition for writ of habeas corpus on behalf of Faren Gherebi, a Guantanamo detainee, which named Secretary of Defense Donald Rumsfeld, President Bush, and other officials as respondents, to be the District of Columbia. Gherebi II, 2004 WL 1534166, at *9. This order was issued for the reasons of venue defect and transfer for convenience of the parties and the interests of justice.

2. Mandamus / Habeas.

Respondents contend that Petitioner's challenge to the legality of Hamdan's confinement is the exclusive province of habeas corpus and therefore this action should not be considered a petition for writ of mandamus. In support of this argument Respondents cite Preiser v. Rodriguez, 411 U.S. 475 (1973). In Preiser, New York State prisoners were deprived of "good-time" credits and filed actions in district courts seeking release pursuant to 42 U.S.C. § 1983. In conjunction with their Section 1983 claims, the prisoners brought petitions for writs of habeas corpus. The Court held that the prisoners' Section 1983 claims could not proceed because "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks

is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Preiser, 411 U.S. at 500. Therefore, "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." Muhammad v. Close, 124 S. Ct. 1303, 1304 (2004) (citing Preiser, 411 U.S. at 500).

Petitioner contends that this action is brought properly as a petition for writ of mandamus because such a writ is the correct method for obtaining relief from the unconstitutional conduct of an officer of the United Slates. In support of this argument Petitioner cites, *inter alia*, Benny v. United States Parole Comm'n, 295 F.3d 977 (9th Cir. 2002). In Benny a parolee petitioned for a writ of habeas corpus, or for a writ of mandamus, to either terminate supervision or to compel an early termination hearing and decision. The Ninth Circuit upheld the district court's denial of the petitioner's request for termination of supervision. Regarding whether the petitioner could proceed with a petition for writ of habeas corpus or a petition for writ of mandamus regarding the early termination hearing, the Court held that habeas was unavailable because the results of that hearing might not affect the fact or duration of the petitioner's confinement: "The fact or duration of Benny's custody is not causally linked to the Commission's delay in making an early termination decision. We conclude that habeas corpus is not the proper process to compel the Commission to hold an early termination hearing." Benny, 295 F.3d at 989. Rather, a petition for a writ of mandamus was the proper method to seek relief. Id. at 990.

Petitioner contends that because he is not challenging the fact or duration of Hamdan's imprisonment, the writ of mandamus is properly applied. Petitioner argues that this action challenges the legality of the military commission process and the conditions of Hamdan's confinement. (Response at 13.) Petitioner contends that "[i]t is entirely

possible that even after the appropriate adjudication of his status and of the claims against him . . . , [Hamdan] will nevertheless be found to be an enemy combatant lawfully detained as a POW, or a war criminal duly convicted and sentenced under U.S. law as enacted by Congress, or in conformity with customary international law." Id. Petitioner finds substantial support for his argument regarding this possible outcome in a statement by a "senior defense official" that the military commission process and detention at Guantanamo Bay are "two distinct issues." (April 5, 2004 Swift Decl. (Dkt. # 2) Ex. A.) At a background briefing the following exchange occurred:

> Q: So is it possible then that somebody could go through a commission, be found not guilty, and then have them say well, congratulations, you're not guilty but you're still an enemy combatant so back into wherever we're holding you?
>
> A: (Senior Defense Official): As a legal matter, they're two completely different questions. They're not being held because of any criminal activity or any charges. They're being held because they're enemy combatants in an ongoing armed conflict. What we're talking about with military commissions is a criminal process so in that regard they're two distinct issues.

Id.

Petitioner offers strong arguments that his challenge to the military commission process and the conditions of Hamdan's detention at the Guantanamo Bay Naval Base sounds in mandamus. However, the petition clearly does seek release for Hamdan not only regarding his status as a pretrial detainee, but also from his status as an enemy combatant. See Petition at 25 ("In the absence of adequate justification,

[Petitioner requests that the Court] order Mr. Hamdan's release").

The Court finds that the question of whether this action may proceed as a petition for writ of mandamus or must be considered exclusively a petition for writ of habeas corpus need not be resolved here because, even if mandamus is available, the habeas corpus element of the petition requires that it be heard in the District of Columbia. Additionally, it would make little sense to transfer only the habeas elements of this action and retain the mandamus portion. See Continental Grain Co. v. The Barge FBL-585, 364 U.S. 19, 25-26 (1960) ("To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.").

Petitioner contends the Court should not reach this result because, as this action seeks primarily mandamus relief, the Court should hear the habeas claims pursuant to the doctrine of pendent venue. (Response at 17.) Under the pendent venue doctrine, "if venue is proper for the 'principal cause of action' . . . a plaintiff [may] add other claims for which venue would not individually be proper." Burnett v. Al Baraka Inv., 274 F. Supp. 2d 86, 98 (D.D.C. 2003). This doctrine is an exception to the general rule that venue must be established for each separate claim in a complaint. See Lamont v. Haig, 590 F.2d 1124, 1135 (D.C. Cir. 1978). The Court does not find application of the pendent venue doctrine to be appropriate here. The Supreme Court recently observed that "[t]he plain language of the habeas statute . . . confirms the general rule that for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district." Padilla, 124 S. Ct. at 2722. Given that the petition challenges Hamdan's physical confinement at Guantanamo Bay, the Court declines to apply the pendent venue doctrine.

There are many valid reasons for this Court to retain both the mandamus and habeas corpus actions in the Western District of Washington. This Court has a hearing date set, a briefing schedule under way, and is not burdened by a deluge of similar suits brought by Guantanamo Bay detainees. Additionally, Hamdan and Swift have a very significant connection to this District through the presence of their counsel. See Response at 23. However, there is no getting around the fact that both the United States Supreme Court and the Ninth Circuit Court of Appeals have indicated that it is appropriate to have all of these challenges from Guantanamo Bay detainees heard in one district court - the District Court of the District of Columbia.[1]

Should that court find itself overburdened by this sudden deluge of habeas corpus petitioners and pendent lawsuits (such as the Bivens claim in Gherebi or the Alien Tort Statute action in Rasul), this Court stands ready, willing, and able to accept the return of this case and to conduct an expedited hearing on the merits.[2] See Eisel v. Secretary of the Army, 477 F.2d 1251, 1256 (D.C. Cir. 1973) (expressing concern that "such an influx could seriously overburden an already busy court system"); Braden v. 30th Judicial Circuit Court of

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[1] All of the cases cited by Petitioner, with the exception of Holmes v. United States Bd. of Parole, 541 F.2d 1243 (7th Cir. 1976), involve situations where the decisionmaker was in the district and the only issue was whether the action should proceed in mandamus or as a habeas corpus claim. Here, the habeas corpus and mandamus claims can co-exist, but only in the district in which habeas is appropriate - the District of Columbia.

Petitioner has not acknowledged one obvious aspect of these Guantanamo Bay detainee cases: These are not typical cases whether called mandamus or habeas corpus, and the United States Supreme Court rightly wants them decided in one district, not all of the nearly 100 district courts in the United States.

[2] Other enemy combatants held in foreign locations would also seek relief in the District of Columbia Court. However, those enemy combatants held in the United States will have their cases heard in the districts in which they are confined.

Kentucky, 410 U.S. 484, 498 n.13 (1973) (stating that Congress was "not motivated solely by a desire to insure that the disputes could be resolved in the most convenient forum. It was also a critical part of the congressional purpose to avoid the vastly disproportionate burden of handling habeas corpus petitions which had fallen, prior to the amendments, on those districts in which large numbers of prisoners are confined.").

3. Next Friend Status.

Because the Court finds that under Padilla, Gherebi II, and other relevant law, this action must be transferred to the United States District Court for the District of Columbia, the Court declines to determine whether Commander Swift may proceed as Hamdan's next friend.

III. CONCLUSION

This Court must accept the guidance of the two higher appellate courts, both of which have expressed a clear preference for consolidating all Guantanamo Bay detainee habeas corpus challenges and related claims within one district only - the District of Columbia District Court. For the foregoing reasons, the Court GRANTS IN PART Respondents' motion (Dkt. # 34). The Court STRIKES the deadlines for Petitioner's reply and TRANSFERS this case to the United States District Court for the District of Columbia.[3]

DATED this 9th day of August, 2004.

/s/
Robert S. Lasnik
United States District Judge

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[3] On July 23, 2004, Professor Arthur R. Miller filed a motion for leave to appear as amicus curiae (Dkt. # 39). Professor Miller filed a memorandum in opposition to Respondents' motion. The Court considered Professor Miller's memorandum to be helpful in resolving the issues presented by Respondents' motion. The Court grants Professor Miller's motion for leave to appear as amicus curiae (Dkt. # 39). The Court also grants Professor Miller's motion for leave to file sur-reply (Dkt. # 41).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES SWIFT, as next friend for Salim Ahmed Hamdan, Petitioner v. DONALD RUMSFELD, et al., Defendants	Civil Action No. CV 04-1519 September 14, 2004 3:00 p.m.

TRANSCRIPT OF MOTIONS
HEARING BEFORE THE
HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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Proceedings reported by machine shorthand, transcript produced by computer-aided transcription

PROCEEDINGS

COURTROOM DEPUTY: Civil action number 04-1519, Charles Swift versus Donald Rumsfeld and others. For the plaintiffs, Benjamin Sharp, Joseph McMillan, and Neal Katyal.

For the defendants, Thomas Swanton, Terry M. Henry, Jonathan Marcus, and David Salmons.

THE COURT: Okay. I'm going to review the history of this case a little bit before we start, partly for my own benefit and partly for the benefit of people who are sitting out there and may not know what this is all about.

Salim Ahmed Hamdan was taken into custody in Afghanistan in November, on November 24th, 2001, the same month the President signed a military order establishing military commissions.

On July the 3rd, 2003, the President determined there was reason to believe that Hamdan was an Al-Queda member, or involved in terrorism, and designated him for trial before a military commission. He had been flown to Cuba sometime in I think June of 2002, a year previously.

In early December 2003, Hamdan was separated from other prisoners and sent to Camp Echo, which is a solitary confinement area just down the road from Camp Delta.

Lieutenant Commander Swift was appointed to represent him on December the 18th, 2003. Commander, I spent five years in the Navy calling people with two and a half stripes Mr. Smith, so I'll call you that, and you and I will know what that means and everybody else will think I'm dissing you, but I'm not.

THE PETITIONER: Yes, sir.

THE COURT: Mr. Swift conferred with Hamdan on multiple occasions between January 30th and sometime in March 2004. He submitted a demand for charges and for speedy trial under the Uniform Code of Military Justice and

the Geneva Convention, and then -- Dereck, do you mind? That keyboard is a little loud in here.

COURTROOM DEPUTY: Yes, Your Honor.

THE COURT: And then Mr. Swift designated -- or Hamdan designated Mr. Swift to serve as his next friend. And this depends on what part of the papers you read. Mr. Swift's affidavit says, "The government had reserved the right to cut off my access to him, and I had no guarantee of continued access."

The briefs say the DOD stated that it might preclude him from meeting Hamdan again. I'm not quite sure there was any threat of that, but that's one of the things we want to sort out here today.

And in any event, in the Western District of Washington on April the 6th, 2004, Mr. Swift filed a petition for mandamus, or, in the alternative, habeas corpus, making a number of claims. The claims were denial of speedy trial, in violation of the Uniform Code of Military Justice, violation of the Geneva Convention, Article 103 and Common Article 3, violation of separation of powers in establishing military commissions, violation of equal protection, the American constitutional right of equal protection in trial before military commissions, violation of Section 1981 of Title 42 for illegal detention, investing military commissions with subject matter jurisdiction in violation of recognized laws of war, and lack of personal jurisdiction over Hamdan by either the appointing authority or any military commission.

The petition sought an order granting Mr. Swift next friend status, which hasn't been done yet, granting mandamus or a show cause order establishing a briefing schedule, determination that Hamdan was being held unconstitutionally, issuance of a writ of mandamus directing the defendants to obey the law and release Hamdan, and ordering the defendants not to use the President's military order of November 13th, 2001 against Hamdan or anyone else, ordering the defendants to justify the continuing

detention of Hamdan, and if no justification, to order his release.

This petition in Washington was assigned to Judge Robert S. Lasnik, who on May 11th, 2004 found that this was the first case to reach a district court challenging the detention of an alien designated by the President as eligible for trial by a military commission.

But Judge Lasnik was persuaded by the government to hold this case in abeyance pending the Supreme Court's decision in the Padilla and Rasul cases. Judge Lasnik, however, made a finding that there was significant evidence about the conditions of Hamdan's detention and credible evidence of a risk of harm to him if the detention continues.

After the Supreme Court decided the Padilla and Rasul cases, Judge Lasnik set a briefing schedule on the petition, with oral arguments to have been held on September the 8th.

But on August 6th, the government moved to dismiss, or for transfer to the District of Columbia, and on August 9th, Judge Lasnik ordered the transfer. He determined, I believe, that Ninth Circuit precedent required a transfer of habeas cases to the District of Columbia. He struggled some with the petitioner's argument that this is a mandamus case and not a habeas case, but he decided that habeas has to come to the District anyway.

He did express a willingness to take the case back if we're swamped here in the District of Columbia, for which we thank Judge Lasnik for his concern.

The motion to dismiss also sought dismissal because Mr. Swift lacks standing as Hamdan's next friend, and Judge Lasnik specifically declined to decide that issue because it was going to be transferred here.

That was on August 6th. We have electronic case filing, but it took almost a month for the case to be docketed here. It was docketed here on September the 2nd. On September the

3rd, Petitioner asked for an early status hearing; that motion was granted on September the 10th, and here we are.

Meanwhile, while these matters were going on in Washington, a charge was filed against Hamdan in Guantanamo Bay. The charge is conspiracy. It was filed on July the 13th.

Hamdan was brought before the commission on August 24th; the preliminary proceedings on that charge have been continued to November the 1st, which is a month and a half away. No trial date has been set.

What the Petitioner wants today is for me to set a schedule for completing the briefing and for oral argument of his petition for mandamus, and he wants a schedule for completing briefing on his motion for discovery.

I should tell you at the outset that he's going to be at least temporarily disappointed on both of those requests, because, because, as Petitioner probably knows, and I'm sure as the Justice Department does know, this court has now habeas cases involving some 60 petitioners out of Guantanamo Bay. And in an effort to sort things out and to avoid a general melee in the courthouse, the chief judge and the calendar committee of this court have asked senior judge Joyce Hens Green to return to this courthouse and act as a coordinator and manager of these Guantanamo Bay cases.

Judge Green's role is in the process of being formalized, but my belief is that she will be asked by something approaching a court rule to take, by referral, all of these cases for purposes not of deciding the substance of them, but of coordinating the scheduling of them and coordinating matters such as security clearances, discovery, briefing schedules, and other procedural matters.

I'm not sure which, if any, of the other petitioners who have suits in this court have fact patterns either as long-standing or as urgent as Hamdan's, but rather than have the

15 judges of this court all move ahead as quickly as they can, there will be a coordinating effort among the other judges.

So this status conference today is for me to hear from the plaintiff, or from the petitioner, what they believe they need in terms of scheduling in order that that information can be passed on to Judge Green, and for me to deal specifically with the standing issue that was raised in Washington but not decided by Judge Lasnik. That I consider to be a substantive matter, and I will rule on that as quickly as I can.

Because if Mr. Swift does not have standing, he certainly needs to know it, and Hamdan needs to know it, and we need to get that part of this case straightened out very quickly.

Now, there is also pending a motion for leave to appear amicus curiae, or a motion filed by or on behalf of two organizations, Allied Educational Foundation and Washington Legal Foundation.

I am not sure that what, if anything, they actually have to add to the substantive issues that are here, but I am going to defer a decision on the amicus status of those parties until Judge Green has had a chance to survey the landscape of this case and see how it compares with the other cases that are here in the courthouse.

So that's by way of a too long introduction. I will hear counsel on whatever they want to tell me about the general status of this matter, and then I would like to hear arguments on the standing issue related to the next friend status of Mr. Swift, or the third party jus tertii issues presented by the motions papers. Who's going to speak for the petitioner?

MR. SHARP: Thank you, Your Honor, for accommodating our request. My name is Benjamin Sharp. I guess I'm a part of the legal team for Mr. Hamdan. I would address what our requests are regarding scheduling and Professor Katyal will address the issue of standing.

THE COURT: All right, sir.

MR. SHARP: We have, as you understand, done everything we can to try to expedite this, and the concerns we have for detainee Hamdan and his deteriorating mental state, and we were held in abeyance and the transfer was slow, so we are prepared to move as fast as is practicable for the Court.

We would like to propose that the briefs for Petitioner be filed in one week's time, and that the government file one week after that in an effort to try to get resolution of the issues that have been raised in the petition as soon as possible, and surely before November 1, which is the second stage of the tribunal for Hamdan, who is, I guess, the number one detainee in having a military tribunal.

THE COURT: Is he the first in line?

MR. SHARP: He is, Your Honor. There are four --

THE COURT: I mean the first in line at Guantanamo Bay.

MR. SHARP: The actual trial date has not been set. He was the first one for -- if you want an arraignment, he is the first one for a next scheduled event on November 1. When the trial date is exactly set is unclear.

THE COURT: Excuse me. What happens on November 1?

MR. SHARP: I'm not sure I can answer that.

THE PETITIONER: If I may, sir.

MR. SHARP: If he might address it. We don't know for certain, but Mr. Swift has the best...

THE PETITIONER: Good afternoon, sir. Sir, currently scheduled is that Mr. Hamdan will appear again before the military commission in the first week of November for the purpose of hearing motions.

At the time we gave -- I gave notice to the military commission of nine motions, largely the same motions as you just read off on grounds. We're proceeding in two separate

courts. We began in federal court; the government, of course, then started in July, as you indicated.

The military commission at that time will take up those. Among the things that the military commission will consider is my request for a abeyance pending an outcome in the federal courts. It's one of the things that's been brought up by the government. We also have thoughts on it as to which is the better course to go, whether the federal court should decide the legality and constitutionality of military commissions or whether we should go through a military commission and then decide whether they were legal or constitutional.

Trial date was initially discussed as 7 December. It was not, however, set. Professor Katyal, who is with me at counsel table, has applied to be a civilian counsel as part of this commission process, and in conjunction with his request, we've requested the 15th of November. What we don't want is delay.

THE COURT: Of November?

THE PETITIONER: Yes, sir. For a trial date. What we don't want is delay. Mr. Hamdan is coming up on a year in solitary confinement, and he seeks a hearing at the earliest opportunity.

Of course he wants a hearing before a legal court. It's been his position from the onset that he's a civilian and that he should be tried in a civilian court, and we seek that in primacy.

But in the event that the alternative position is taken - that is, that we should go through a military commission first and then decide its legality afterwards - then we seek to expeditiously dispose of that case in accordance with our real fears of his mental health.

THE COURT: As a practical matter, if you have basically a motions hearing on November 1st, is there any

realistic possibility that this case goes to trial on November 15th or even December 7th?

THE PETITIONER: Well, it raises a very interesting idea, because it goes to the very structure of the commission itself, sir. On the commission, and I have no way of saying, because the commission is not made up of any court that you're familiar with. It has one former military judge as the presiding officer and four members who are lay people. I don't know if lay people deal with the law faster than do lawyers and judges, but inside the position, if one looks historically at Quirin, they made those decision in a matter of hours.

THE COURT: Oh, yeah. I'm not so much concerned with that as I am with the question of trial-preparation either by you or by the -- either by you or by the prosecution. I have no idea what anybody's notion is of pretrial discovery in these cases, if there is any such thing.

THE PETITIONER: Much of that will play out over time. We're asking for 15 November because we believe we can be ready by that period of time.

I have been assigned to the case. Though charges were referred in July, I have been assigned to the case for now more than nine months. I've had an opportunity to go to Yemen and an opportunity to develop much of the defense case.

Discovery remains an issue, and we'll see how fast that goes. If the government is amenable to it, allows interviews of witnesses, allows interviews of detainees, then there's no reason to believe that we couldn't be ready on 15 November.

On the other hand, if the government blocks those, then recent experience in the federal courts could certainly indicate that there would be a significant delay while it's decided exactly how much discovery I get.

As I said, we seek from the onset -- in February I asked for a speedy trial on Mr. Hamdan's behalf. I've sought that

both in the federal courts and before the military commission, to have this speedily decided.

We believe that the appropriate methodology is for the federal courts to determine first the legality, as what's historically consistent with Quirin and other cases, that the federal court is best disposed to determine these threshold issues of jurisdiction and constitutionality.

It is historic, as Your Honor may well be familiar with the Uniform Code of Military Justice, prior to the appointment of a military judge in 1968 that the federal courts did take a hard look at the issues of jurisdiction, and that could be before even beginning a proceeding. It applies with Quirin.

So we look at it from the standpoint that we believe that this court can make a decision by that time. If the Court has deferred, then we want to go to trial. If the Court has decided to take on this case and to determine on those issues, then of course we're going to take as long as it takes to make the right decisions here.

THE COURT: Okay. My own acquaintance with the uniform code predates 1968, but it used to be that there would be a charge and then specifications. Are there specifications to the charge of conspiracy?

THE PETITIONER: There is a single charge with listed allegations of fact. It hasn't immediately complied with the charges you would understand it from the Uniform Code of Military Justice; it would be closer to the charges you would understand from federal pleadings. It has a singular charge of conspiracy.

I would note that the charge that they have put before Mr. Hamdan - it was not in our original briefs - but it is a charge, in our belief, that has never before been tried by a military jurisdiction. So the jurisdiction of it is certainly speculative. But it is a charge set out with allegations of

general facts and then specific facts in support of it in basic notice pleading.

THE COURT: All right. Thank you, sir.

THE PETITIONER: Thank you, sir.

THE COURT: Mr. Sharp, you want briefs in a week, one week, one week. That's pretty straightforward. What is the discovery request?

THE PETITIONER: I'll be back, sir, if I might.

MR. SHARP: I'm sorry. This is not very efficient.

THE COURT: I didn't think that was such a hard question, Mr. Sharp. But I understand that Mr. Swift is ...

THE PETITIONER: Your Honor, in conjunction with military commission proceedings, I've been provided more than enough discovery for us to go forward in this hearing. The question is whether -- my ability to share it with my civilian counterparts, who are invaluable in preparing for this court.

I am currently under a protective order from the military commissions, and the military commissions are no doubt concerned that that same protective order does not extend to the civilian counsel.

What I would propose is that for this court, a rule of discovery simply to issue a protective order to civilian counsel, that they must hold protected information, none of which I would be sharing is classified, and not distribute it to the media or to any other person, and must keep it within the defense team or file it under seal to this court. That would dispense with our need for discovery.

THE COURT: You think a protective order from this court would insulate you from violations -- from claims that you violated the protective order of the military court?

THE PETITIONER: Yes, I would, sir. Based on the representation of the presiding officer down there that he would certainly give deference to any ruling by a federal court, and if federal court had extended -- in fact, inside the

protective order that I received, that I could certainly distribute them within any cause by a federal court. This was to provide the situation where I gave the materials to someone who was under no protective order, and that doesn't make sense.

But at this point we would ask that the Court issue an additional protective order, and I can certainly furnish a copy of the protective order issued by the presiding officer in Guantanamo Bay. If that extends to our civilian counsel, then we don't see that there's going to be a need for discovery and we'll be good to go on that one.

THE COURT: Thank you, Mr. Swift. Does the government have anything to say on these status questions?

MR. HENRY: Your Honor, I'm Terry Henry with the Department of Justice. And let me just make a few comments on the status questions, and then Jonathan Marcus, also from the Department of Justice, can address the next friend standing issue.

THE COURT: All right.

MR. HENRY: As far as briefing and that sort of thing with respect to the merits motion to dismiss that's involved in the case, I think that the government's position is that the most efficient and the best way to proceed in the case would be for Your Honor or Judge Green -- or I understand from the judge's comments, Your Honor's comments, that you would be the one deciding it, but that the Court should go ahead and determine the standing issue. Because the resolution of that issue will definitely impact whether the case proceeds as is or not. And that that decision should go forward.

And then given that there is significant overlap between the issues, the merits issues that are involved in this case and the other Guantanamo Bay cases, we think that a briefing schedule on the merits issues should be determined by Judge Green in her coordinating role.

Your Honor asked a question as to whether there are other opinion cases that may have fact patterns as similar or as urgent as the one in this case. There is one of the cases that Judge Green is coordinating, Rasul versus Bush. It's 02-299. In that case, the remaining petitioner in the case, David Hicks, recently filed a motion to file an amended petition which raises many of the exact same issues involved in this case.

He also has been involved in military commission proceedings, and he raises many of the exact same claims that are raised in this case.

So given that, we think that, you know, the Court should go ahead and decide the standing issue, and then Judge Green can coordinate the briefing even between those two cases since the issues are very similar.

The issues involved in this case also raise many legal points that overlap with the other Guantanamo Bay cases, including whether aliens detained at Guantanamo Bay can avail themselves of the Constitution, whether the Geneva Convention and other international law provisions or treaties are self-executing. A number of issues like that are wrapped up in the other Guantanamo Bay cases, even the ones that don't involve military commission situations.

So we think it's appropriate for the briefing on those issues to be coordinated by Judge Green, and that basically leaves us with now asking you to go ahead and decide the next friend standing issue and then let Judge Green set a briefing schedule on the other issues in the case.

I should probably address this notion of a protective order in lieu of discovery. Your Honor, I'm not really prepared to comment on it because I don't know if that's okay with the military commission folks or what the situation is there, and we can try to check on that. I guess I would suggest that counsel for Petitioner coordinate with us and also the military commission to try to work that out.

Just having heard about this for the first time today, I share Your Honor's concerns that if Your Honor were to issue a protective order, that would not necessarily relieve petitioners from the constraints of a military commission order, but rather there would need to be some coordination there. And maybe the military commission --

THE COURT: Right. But as Mr. Swift puts it to me, we're not talking about security clearances. That's a different kind of a problem. He's not talking about releasing secure information or classified information.

MR. HENRY: I understood him to be talking about that. We're just talking about the terms of the various protective orders and that sort of thing.

And I guess that is our comments.

THE COURT : Thank you. Mr. Swift?

THE PETITIONER: Thank you, sir. Actually, allow me the opportunity to bring a couple of things to Your Honor's attention in the Judge Green issue.

The position the government takes now is an amazing reversal from the position they had only a few months ago. A few months ago they talked about military commissions and detainees as apples and oranges. In fact, they've used that analogy multiple times, saying that a military commission and a detainee have no similar issues, and, in fact, someone who goes through a military commission is not even going to be released. They become a detainee again.

That's on the idea that they actually have been acquited by the military commission.

THE COURT: I read that.

THE PETITIONER: Yes. And in that standpoint, all of the issues as to the Constitution and all of the issues as to the Geneva Conventions come at it from completely different positions. The Geneva Conventions and the issues of self-execution are far different, for instance, when one is looking to invoke the conventions for a process for international law

or the laws of war, as opposed to the view of looking at it for a position of detention, and what rights do you have under a detention as a POW.

Similarly, the Constitution, if one is looking at the Verdugo decision, our challenges are not founded in the Bill of Rights; rather, they are founded in the President's constitutional power to actually bring into place a commission. And that's never been held to be within solely the territory of the United States.

So the issues are not going to be the same. They are significantly different. They're also even different in the Hicks case. The Hicks case, and just to go down through it --

THE COURT: We're getting a little ahead of ourselves, aren't we?

THE PETITIONER: Yes. But just from the standpoint they did suggest that Hicks would also be part of some sort of a consolidation, and I sit only there that Hicks is procedurally in a different position, Your Honor. He stands where we did five months ago.

We certainly expect the government to argue that based on his counsel's arguments before the Supreme Court, that he waived his rights to challenge military commissions. His charges are far different, including murder by -- attempted murder by an unprivileged belligerent, a historic war crime, as opposed to ours; personal jurisdiction, he's alleged to be a combatant, where our Mr Hamdan is merely alleged to be a supporter. There's no evidence that he's not a civilian.

And finally, Mr. Hicks is an Australian citizen, and he's received significant benefits from that based on negotiations with the Australian government, benefits that Mr. Hamdan has not received. The cases really don't add up to being the same.

Yes, they're detainees before military commissions, but they're going to, again, present far different issues.

Guantanamo has been dealt with as a monolith that all detainees are the same. That's simply not true, Your Honor.

In Mr. Hamdan's case, he represents significantly different issues than have been before any other court up until this point. I'm not sure what Judge Green can do for us other than say that it should be expeditiously decided.

Unlike the questions that Judge Green is trying to work through, we don't need security clearances for my counsel. We simply need a protective order. We don't need to work out a discovery calendar based on the extension of that protective order, and we are basically a reply brief's away from arguments and decisions on this for a man who has waited for nine months in solitary confinement for such a decision.

Thank you, sir.

THE COURT: Okay. Mr. Henry, you have something more to say on that point before we move on to the standing question?

MR. HENRY: Yes, Your Honor. Just to clarify, I think Mr. Swift is trying to blend apples and oranges where we are not. Obviously there are differences between military commission proceedings and just the detention of alien enemy combatants as enemy combatants.

But the point of my earlier remarks was that the issues in these cases do overlap, in that the issue of whether or not an alien enemy combatant can avail themselves of the Constitution would apply to an enemy combatant challenging his detention generally, as well as whether someone involved in military commission proceedings could avail themselves of the Constitution to challenge the military commission proceedings.

So there is overlap, and because of that we think that it would be appropriate for Judge Green to decide how these merits issues get briefed so that we can proceed along.

THE COURT: Let the record reflect that there are apples and there are oranges, and they either overlap or don't overlap. Now let me hear from Mr. Marcus on the subject of the standing question, since it's his motion.

And let me ask you, just before we get too far down this road. Maybe I already know the answer from having heard the length and strength of the arguments on whether there should be a protective order or not. But is this trip necessary? I mean, what's the real problem here? Mr. Hamdan has a lawyer. He's got lots of lawyers. Isn't the problem solved if they just amend so that the petitioner is Hamdan?

MR. MARCUS: They could solve the problem by doing that, Your Honor.

THE COURT: And you wouldn't have any objection to that?

MR. MARCUS: To them amending and filing a new petition with Mr. Hamdan as the Petitioner? No.

THE COURT: Well, you don't have to file a new petition, just amend to change the parties.

MR. MARCUS: They could do that. They could do that, Your Honor.

THE COURT: Well, then, sit down. Let me ask Professor Katyal. Maybe this will be a short argument.

Professor, why not?

MR. KATYAL: Thank you, Your Honor, for allowing us to be here. We believe that we certainly have the power to amend; however, what we're doing is fully consistent with next friend standing, as the cases have elucidated, and we're not doing anything improper at all by filing a next friend petition. We're actually within the heartland of what a next friend petition is.

So we actually think the appropriate way is a next friend petition, though we acknowledge that there's really not much at stake here in this motion whatsoever except the case caption. We happen to think, as a matter of procedural nicety

and squareness with the case law, that what we're doing as next friend is the appropriate way to be. But we would certainly amend if the Court deemed it --

THE COURT: But is it worth hanging on to that and then risking going all the way up to the court of appeals and finding out that some other court has a different view of it?

MR. KATYAL: Well, Your Honor, the same precedents on amendment have the same parallel views in the court of appeals as well as --

THE COURT: Except the government concedes the power to amend and go forward with an amendment, so there won't be any appeal of that issue.

MR. KATYAL: To the extent that there's an amendment here, that's absolutely right. Our only point is if we had lost this issue on next friend standing and somehow it were interlocutorily appealed to the appeals court - something that we don't think is possible - even there the Court would be able to amend it.

THE COURT: Well, I mean, I have read with great interest an awful lot of very eloquent and well informed briefing on this subject on the question of exactly when he had to have had access or not have access, and what constitutes a next friend, and whether or not his mental state is really so impaired as to make it necessary for him to be a next friend or not. And at some point I got the idea this was almost as much about Mr. Swift as it was about Hamdan.

And the question is whether -- at one point, you know -- I don't have to tell you; you wrote the papers. You make this impassioned argument about Mr. Swift being at risk for having undertaken the representation that he believes he was ordered not to do, and he did it at his own risk, and in the exercise of his belief that that was the only way he could responsibly behave as a lawyer. And all that's laudable.

But is he still at risk? Do we have to go down this track in order to deal with that risk, or can we just amend these things and get on with it?

MR. KATYAL: As far as I understand, Commander Swift is not at risk anymore. Our only point is if the government's standard is what is the situation at the time of the filing, all of those facts that we've talked about and perhaps belabored too much are all just going to that particular issue to show that there was standing at the time the petition was filed.

We don't mean in any way to try and eliminate judicial economy. What we've tried to do is move this case along as fast as we can because Mr. Hamdan has been in solitary confinement for over 270 days.

So if this court believed that in the interest of judicial efficiency an amendment were the appropriate way to proceed, then that would be find fine with us. We would have no objection. Our only point is just in terms of squaring it with the procedural rules that are at issue, a next friend petition is the appropriate way.

THE COURT: Well, let me give you a little lesson in judicial realism. You know, this goes right along with that lesson about what the judge ate for breakfast. We all learned that in law school; you probably teach that in law school.

It is now the 14th of September. Every judge of this court, every federal judge around the country is spending the rest of this month doing two things, interviewing law clerks and getting finished as many as he can of his old motions so that he doesn't get publicly reported at the end of September. Right?

And you have presented me with a legal Rubiks cube in these motion papers which I will sort through and manfully write an opinion about, but it will be some time before I get an opinion out on this issue.

And I hear both sides saying, you don't really have to do that, Judge, because they don't object if you amend, you don't object if we amend. Why don't we just get it done?

MR. KATYAL: Absolutely fine, Your Honor. We've tried to move this case along at every turn, and that's absolutely fine with us if that would be the way the Court would proceed.

THE COURT: All right. I understand that the brief writing you've done may look to you in retrospect like building tanks and driving them over a cliff, and there are excellent briefs on both sides, but if we have a way out of this without having to decide these exquisite issues, let's just do it. All right? Everybody is nodding his head.

The petition for writ of mandamus pursuant to 28 USC 1361, or, in the alternative, writ of habeas corpus, is hereby deemed amended so that it is filed in the principal name of Salim Ahmed Hamdan, with Lieutenant Commander Charles Swift, yourself, Mr. Sharp and the others as counsel. Fair enough?

MR. KATYAL: Absolutely.

THE COURT: Done? And all further pleadings will be filed with that caption, and the docket of the case will so reflect without further order. Mr. Marcus?

MR. MARCUS: Your Honor, the only issue we raise is to the extent this is considered a habeas petition, there's a requirement that Mr. Hamdan be able to sign the amended petition.

THE COURT: And Mr. Hamdan will sign it as soon as it can possibly be presented to him, and the signature will be deemed to be nunc pro tunc.

All right, everybody? Good.

Then this matter will now be referred to Judge Joyce Hens Green, who will schedule any further proceedings. It will be referred with a recommendation from me that she promptly turn her attention to the protective order situation,

and with some appropriate information from me about where this matter appears to stand in line with the other petitions, which I think is at the head of the line. But that is for her to decide.

And you will hear further from her or from me, but -- please understand, the case is still assigned to me, but it is being referred to Judge Green in her role as coordinator and manager of scheduling. And that's where we have to leave it today. All right?

Thank you very much, counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN, Petitioner, v. DONALD R. RUMSFELD, Secretary of Defense, *et al.*, Respondents.	Civil Action No. 04-CV-1519 (JK) ECF

NOTICE OF CHANGE OF CIRCUMSTANCES

In respondents' briefing in this case, it was represented that petitioner was being held in Camp Echo at Guantanamo Bay, Cuba. See Respondents' Cross Motion to Dismiss at 11, 23, 27-28, 37; Respondents' Reply Memorandum to Opposition to Cross-Motion to Dismiss at 9-10. Respondents have recently learned that pre-commission detainees, including Salim Ahmed Hamdan, have been transferred from Camp Echo to a cell block reserved for military commission detainees within Camp Delta at Guantanamo Bay. Pre-commission detainees will be transferred back to Camp Echo when visiting with their counsel, however.

This Notice is provided so that the Court is accurately informed regarding petitioner's current detention.

DATED this 22nd day of October, 2004.

Respectfully submitted,

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